Petition

No. 81-411

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE,

Petitioners,

v.

LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Congress, in enacting the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601, *et seq.*, intended to create a federal transit labor law enforceable in, and by, federal courts to govern contract disputes between public transit authorities and their employees.

2. Whether Congress, in enacting the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601, *et seq.*, intended to authorize federal courts to formulate a "federal common law" to govern contract disputes between local public transit authorities and their employees.

3. Whether an employee's, or union's, claim that a municipal transit authority breached a collective bargaining agreement executed in 1975 states a "claim arising under the laws of the United States" within the meaning of 28 U.S.C. § 1331(a) solely because the municipal transit authority received federal funds, in 1966, through a grant authorized by the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601, *et seq.*

4. Whether Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1609(c), creates a federal private cause of action for an alleged breach of a collective bargaining agreement, executed in 1975, by a municipal transit operator who received federal funds under the Act, in 1966.

PARTIES BELOW

The parties to the proceeding in the United States Court of Appeals for the Sixth Circuit were Jackson Transit Authority and the City of Jackson, Tennessee, Petitioners herein and defendants below, William T. Coleman, Jr., Secretary of Transportation, and William J. Usery, Secretary of Labor, also defendants below, and Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC, Respondent herein and plaintiff below.

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. The Court below has decided substantial questions in a manner inconsistent with cases recently decided by this Court	8
II. This Case presents questions of great public importance	17
CONCLUSION	24
APPENDIX	1a
Opinion Below	1a
Related Decision Below	20a
Judgment Appealed From	31a

TABLE OF AUTHORITIES

Cases

Alewine v. City Council of Augusta, 505 F. Supp. 880 (S.D. Ga. 1981)	20
Andrechek v. Port Auth. of Allegheny Co., (W.D. Pa. Civ. No. 80-222)	24
California v. Sierra Club, ___ U.S. ___, 101 S. Ct. 1775 (1981)	15, 16, 17
Cannon v. University of Chicago, 441 U.S. 677 (1979)	12, 14
City of Atlanta v. MARTA, 506 F. Supp. 883 (N.D. Ga. 1980), *aff'd*, 636 F.2d 1084 (5th Cir. 1981)	24

PAGE

Cohen v. MBTA, (D.C. Mass. Civ. No. 81-791), *aff'd*, ___ F.2d ___ (1st Cir. 1981) 24

Cort v. Ash, 422 U.S. 66 (1975) 7, 12, 14, 16, 20, 21

Division 174 and Division 1037, Amalgamated Transit Union v. Southeastern Regional District Commission, No. 80-2427-S (D. Mass. Feb. 25, 1981) 23

Division 580, Amalgamated Transit Union v. Central New York Regional Transit Authority, 556 F.2d 659 (2d Cir. 1977) 13, 23

Division 587, Amalgamated Transit Union v. Municipality of Metropolitan Seattle, No. C80-1227M (W.D. Wash. Dec. 19, 1980) 23

Division 788, Amalgamated Transit Union v. Bi-State Development Agency of the Missouri-Illinois Metropolitan District, No. 80-1339-C(4) (E.D. Mo. Feb. 26, 1981) 23

Division 1177, Amalgamated Transit Union v. Tidewater Transportation District Commission, No. 79-968-N (E.D. Va. Nov. 8, 1979) 24

Division 1212, Amalgamated Transit Union v. Chattanooga Area Regional Transportation Authority, 483 F. Supp. 37 (E.D. Tenn. 1979) 23

Division 1235, Amalgamated Transit Union v. Metropolitan Transit Authority, 650 F.2d 1389 (6th Cir. 1981) 23

Division 1287, Amalgamated Transit Union v. Kansas City Area Transportation Authority, 582 F.2d 444 (8th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979) 13, 23

Division 1287, Amalgamated Transit Union v. Kansas City Area Transportation Authority, No. 77-0663-CV-W-2 (W.D. Mo. Feb. 21, 1980) 23

PAGE

Division 1309, Amalgamated Transit Union v. San Diego Transit Corporation, No. 78-1093-E (S.D. Cal. Jan. 9, 1979) 24

Division 1447, Amalgamated Transit Union v. Louisville and Jefferson County Transit Authority, No. 80-3203 (6th Cir. July 28, 1981) 23

Division 1575, Amalgamated Transit Union v. Golden Gate Bridge, Highway and Transportation District, No. C-79-2278 WHO L (N.D. Cal. May 27, 1980 23

Dopico v. Goldschmidt, No. 80 Civ. 4562 (S.D.N.Y. July 24, 1981) 10

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 18

Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980) 15

Local Division 519, Amalgamated Transit Union v. LaCrosse Municipal Transit Utility, 585 F.2d 1340 (7th Cir. 1978) 13, 23

Local Division 589, Amalgamated Transit Union v. Commonwealth of Massachusetts, 511 F. Supp. 312 (D. Mass. 1981) 23

Local Division No. 714 v. Greater Portland Transit District, 589 F.2d 1 (1st Cir. 1978) 13, 23

Local Division 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Authority, No. C81-774A (N.D. Ga. June 24, 1981) 23

Local Division 732 Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Auth., No. C80-1601A (N.D. Ga. Oct. 2, 1980) 23

Local Div. 1235, Amalgamated Transit Union v. Metropolitan Area Transit Authority, Nos. 80-3452 and 79-3275 (M.D. Tenn. Oct. 16, 1980), *appeal docketed*, No. 80-5397 (6th Cir. 1980) 23

PAGE

Middlesex County Sewerage Authority v. National Sea Clammers Association, ___ U.S. ___, 101 S. Ct. 2615 (1981) 15

National League of Cities v. Usery, 426 U.S. 833 (1976) 20, 21

Northwest Airlines, Inc. v. Transport Workers Union, ___ U.S. ___, 101 S. Ct. 1571 (1981) 15

Pennhurst State School and Hospital v. Halderman, ___ U.S. ___, 101 S. Ct. 1531 (1981) 16

Texas Industries, Inc. v. Radcliff Materials, Inc., ___ U.S. ___, 101 S. Ct. 2061 (1981) 15, 19

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 19

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 15

Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979) 14, 15

United Transportation Union v. Long Island Railroad, 634 F.2d 19 (2d Cir. 1980), *cert. granted,* 49 U.S.L.W. 3945 (1981) 20, 21

Universities Research Association v. Coutu, ___ U.S. ___, 101 S. Ct. 1451 (1981) 15

Statutes

Labor-Management Relations Act:

29 U.S.C. § 141 19

National Labor Relations Act:

29 U.S.C. § 151 19

29 U.S.C. § 152(2) 19

Railway Labor Act, 45 U.S.C. § 151 19

Urban Mass Transportation Act:

49 U.S.C. § 1601, *et seq.* 6

Section 13(c)(5), 49 U.S.C. § 1609(c) 7, 8, 11, 12, 13, 16, 17, 19

	PAGE
49 U.S.C. § 1601(a)(2)	9
49 U.S.C. § 1601(a)(3)	9
49 U.S.C. § 1601(b)	9
49 U.S.C. § 1601a	9
49 U.S.C. § 1601b	9
49 U.S.C. § 1601b(7)	9
49 U.S.C. § 1602	9
49 U.S.C. § 1604	9
49 U.S.C. § 1607	10
49 U.S.C. § 1609(c)	2, 4
49 U.S.C. § 1614	4
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331(a)	3, 6, 7
28 U.S.C. § 1337	6
Tenn. Code Ann. § 6-3802 (Supp. 1976)	4

Other Authorities

1964 U.S. Code Cong. & Ad. News	22

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Jackson Transit Authority and the City of Jackson, Tennessee, defendants in the suit below, respectfully pray for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 3, 1981.

OPINIONS BELOW

On June 3, 1981, after consideration by a three-judge panel, the Sixth Circuit issued an opinion and judgment reversing and remanding the District Court's judgment dismissing the claim of the Respondent Union for lack of federal subject matter jurisdiction. The majority and dissenting opinions are reported at 650 F.2d 1379 (1981), and they are reproduced at pages 1a through 19a of the appendix hereto. The opinion of the United States District Court for the Western District of Tennessee, Eastern Division, (Wellford, J.) dated December 23, 1977, is reported at 447 F. Supp. 88 (1977) and is reproduced at pages 20a through 30a of the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit reversing and remanding the District Court's judgment was decided and entered on June 3, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1609(c):

> (c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to

their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

28 U.S.C. § 1331(a):

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

Jackson, Tennessee is a small municipality in the western portion of Tennessee, located approximately midway between Memphis and Nashville. From the Complaint, it appears that Jackson City Lines, Inc., a private bus company, rendered transit service until April 1966 when it decided that it could no longer render service. In order to continue the existing bus service, the City of Jackson, pursuant to the statutory authorization of the Tennessee Code, created the Jackson Transit Authority[1] as a public function.

Jackson was specifically granted the power and authority to ". . . bargain collectively with labor organizations representing employees and may enter into agreements with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retire-

[1] For convenience, the Petitioners will be referred to as "Jackson" and the Respondent Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC, will be referred to as "Union."

ment allowances of such employees." Tenn. Code Ann. § 6-3802 (Supp. 1976). In addition, Jackson was authorized to enter into "fair and equitable" arrangements for protection of employees of existing transportation systems, including continuation of collective bargaining rights.

In order to facilitate the transit services to be provided by Jackson, it filed a capital grant application under the Urban Mass Transportation Act ("UMTA") to assist in the purchase of twelve new buses and construction of a bus maintenance facility to replace those of the former private operation.

As a condition of federal funding, § 13(c) of UMTA requires grant recipients to make "fair and equitable arrangements" for the protection of their employees' interests and further requires that any assistance contract must specify the terms and conditions of their protective arrangements.

In order to qualify for a grant, Jackson entered into a "Section 13(c) Agreement" with the Union, which had been the collective bargaining agent for the transit employees since 1943.[2] That agreement was submitted to the Secretary of Labor, who certified that it met the "fair and equitable" standard of § 13(c). In accordance with § 13(c)(5), the substance of the agreement was incorporated in the grant contract between Jackson and the United States and, pursuant to the grant contract, Jackson was granted $279,000.

At the time this complaint was filed, Jackson had received no other UMTA grants, since 1966.[3]

[2] At the time the complaint was filed, Jackson employed 21 persons of whom 18 were represented by the Union.

[3] Subsequent to the adoption of the Federal Public Transportation Act of 1978 (P.L. 95-599), Jackson has been eligible to receive, and has received, certain subsidies, made available to states to "pass through" to certain "non-urbanized" transit systems by reason of the Act. See 49 U.S.C. § 1614.

Also in 1966, Jackson entered into a management contract with T. O. Petty, an individual, to manage Jackson's transit system. Between 1966 and 1975, Petty and the Union negotiated three collective bargaining agreements, each of three years duration. There is no allegation that any of these agreements were breached. In 1975, a fourth collective bargaining agreement was executed by Petty and the Union to cover the period between April 1, 1975 and April 1, 1978. Shortly after execution of the 1975 agreement, Petty resigned as manager and the management contract terminated.

In December 1975, acting upon the advice of its attorney, Jackson notified the Union that the most recently negotiated agreement was not valid, subsisting and binding.[4] Jackson requested the Union to "sit down and discuss" the matter with them and until such time the "cost of living escalator" would not be honored and wages currently in effect would be "frozen." Jackson sought a satisfactory meeting date.[5]

Instead of meeting with Jackson, the Union, through its International President, sought a "determination" from the Secretaries of Labor and Transportation that Jackson "in attempting to nullify the collective bargaining agreement and in thereafter breaching its provisions, had

[4] The City Attorney concluded that Jackson does not "have any contractual relationship with the Union" indicating (1) that the April 1975 agreement between Petty and the Union was personal to Petty and since he had resigned as Manager, the agreement did not bind Jackson, and (2) that the April 1975 agreement was *ultra vires* because it created an obligation in excess of $5,000 without the express approval of the Board of Commissioners, *i.e.*, that it had not been properly ratified pursuant to the requirements of the city ordinance creating the Authority.

[5] In addition to reciting the lack of a contractual relationship, Jackson forwarded to the Union a recently completed city audit which disclosed the substantial deficits that the bus operation had incurred.

violated the Section 13(c) Agreement." The Secretaries of Labor and Transportation refused to do so.

Shortly thereafter, the Union filed this action in the United States District Court for the Western District of Tennessee.[6] The Union sought injunctive and monetary relief against Jackson and relief in the nature of mandamus against the Secretaries of Labor and Transportation. The Complaint alleged the breach of the collective bargaining agreement. The Secretary of Labor, it was alleged, failed to exercise his statutory duty as required by UMTA to determine that Jackson violated the § 13(c) Agreement and to take necessary steps to insure compliance with the said § 13(c) Agreement. Further, it was alleged that the Secretary of Transportation failed to enforce compliance with the § 13(c) Agreement. The Complaint did not allege that Jackson had violated any provision of UMTA and it did not raise any issue of construction or interpretation of UMTA.

Jackson and the United States each filed Motions to Dismiss the Union's Complaint for want of subject matter jurisdiction. The District Court granted both motions to dismiss because Judge Wellford concluded that:

> [T]his Court is convinced that plaintiff's right of collective bargaining will not be lost if this matter is left for state law on the basis of a breach of contract or arbitration claim. . . . The contract which is sought to be enforced sets out private rights which may be enforced, if necessary, in state court. The rights of plaintiff were preserved in the contract which was approved by federal authorities as a part of a grant application procedure. This Court is not inclined to

[6] The Union asserted that the court possessed jurisdiction of the action against Jackson by virtue of 28 U.S.C. § 1331(a), by 28 U.S.C. § 1337 (a statute regulating interstate commerce), by UMTA, 49 U.S.C. § 1601, *et seq.* and by "pendent jurisdiction . . . with respect to a cause of action arising from breach of contract."

> find that federal law has pre-empted state remedies as claimed by plaintiff. . . .
>
> In summary, plaintiff seeks to enforce, or an interpretation of, asserted contractual rights in this cause. The suit is not basically concerned with the validity or construction of a federal statute or the action taken by an administrative officer or agency under provisions of the federal statute. (28-29a)

The Sixth Circuit affirmed the District Court's holding as to the Federal Defendants[7] but, in a 2-1 opinion, reversed the District Court's holding as to Jackson. The court found subject matter jurisdiction under 28 U.S.C. § 1331(a), adopting the Union's contention that their action to enforce an "existing" local collective bargaining contract "arose" from a right guaranteed to transit employees by § 13(c) of UMTA. Because the Sixth Circuit found that the right asserted derived from a federal statute, the court concluded that the Union's claim arose under the laws of the United States.

Furthermore, the Sixth Circuit found, using the test set out in *Cort v. Ash*, 422 U.S. 66 (1975), that it was proper to imply a private federal remedy under § 13(c) for breach of a collective bargaining agreement by public transit authorities, i.e., that "Section 13(c) reflects *national* labor policy" (12a) (emphasis in the original) enforceable in federal court. Although the court noted the "recent tendency on the part of the Supreme Court to limit the inference of private actions from federal statutes," (13a) the court opted not to give effect to the directives of these cases.

These same cases, however, prompted Circuit Judge Merritt to dissent:

[7] The Court of Appeals held that the Secretary of Labor and the Secretary of Transportation had been given no enforcement authority by § 13(c).

> But there is nothing in the statute itself or the committee reports and debates that even hints that Congress contemplated that federal courts would decide what contractual rights should be preserved and what salary and fringe benefits are "fair and equitable" when a municipal transit worker is aggrieved by the action of his employer. There is a large number of bus drivers in the country, and Congress wanted them to know that it had considered their interests and authorized some administrative protection. But this does not mean that Congress intended to engraft a judicial remedy on the statute. Congress has not provided a principle or rule of decision for us to administer in such cases — other than general fairness. There is at stake no clearly enunciated national policy relating to municipal employee relations. There is no reason to think that state courts in the performance of their traditional, common law role cannot decide these private breach of contract cases just as fairly and just as efficiently as federal courts. (19a.)

Following its decision, the Sixth Circuit recalled its mandate in order to permit Jackson to petition the Supreme Court of the United States for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE COURT BELOW HAS DECIDED SUBSTANTIAL QUESTIONS IN A MANNER INCONSISTENT WITH CASES RECENTLY DECIDED BY THIS COURT.

The key question in this case is whether § 13(c) of UMTA impliedly grants employees of a municipally owned public transit system a private federal cause of action, enforceable in federal courts, for breach of contract because the transit authority has received federal funds. There is no dispute that UMTA does not expressly create such a right.

UMTA is a grant program, and was enacted by Congress to treat the growing problem of lack of "satisfactory movement of people and goods within [urban] areas" resulting from "deterioration or inadequate provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning. . . ."[8] Because Congress found that "the maintenance of even minimal mass transportation service . . . has become so financially burdensome as to threaten [its] continuation" and that "the termination of such service or the continued increase in its cost to the user is undesirable, and may have a particularly serious adverse effect upon the welfare of a substantial number of lower income persons"[9] the Congress enacted UMTA.

Thus, UMTA was enacted in order to facilitate municipal and state operation of transit systems, many of which were formerly operated by private parties. The purposes of UMTA are "to assist in the development of improved mass transportation facilities, equipment, techniques, and methods . . . to encourage the planning and establishment of areawide transportation systems needed for economical and desirable urban development . . . and to provide assistance to State and local governments and their instrumentalities in financing such systems. . . ."[10]

To accomplish these purposes, Congress also found that immediate provision of federal financial assistance to local systems was essential.[11] The various sections of UMTA, pursuant to the overall purposes, provide in detail for different grant programs to facilitate development of mass transportation, facilities, and equipment;[12] and for long

[8] 49 U.S.C. § 1601(a)(2).

[9] 49 U.S.C. § 1601b.

[10] 49 U.S.C. § 1601(b).

[11] 49 U.S.C. §§ 1601(a)(3), 1601a, 1601b(7).

[12] 49 U.S.C. §§ 1602, 1604.

range study for the planning and establishing of areawide transportation systems.[13]

In order to secure funding available under the Act, localities must undertake and complete a number of preliminary steps including certain transportation planning, relocation assistance to displaced persons, compliance with federal civil rights and environmental protection laws, preparation of certain reports and financial audits, provision for low fares to elderly and handicapped persons, and arrangements to meet labor standards.

The Congressional concern was clearly to "assist" and "encourage" states and localities to develop various mass transit programs via federal grants in order to benefit citizens of localities who might patronize efficient, economical high quality public transportation. Nowhere in the statute or legislative history is there evidence that the Congressional purpose was to pass a new federal transit labor law for the benefit of urban mass transit employees or to otherwise create any new federal substantive rights.[14] The only section of UMTA that addresses labor relations is § 13(c) which provides for certain labor protections to be afforded to employees who might somehow be harmed as a result of federal assistance.

In order to affect these labor protections, one condition of the federal grant under UMTA is that transit authorities enter into certain arrangements with employees of any private transit system replaced or acquired by the

[13] 49 U.S.C. § 1607.

[14] See *Dopico v. Goldschmidt*, No. 80 Civ. 4562 (S.D.N.Y. July 24, 1981) holding that § 16 of UMTA, 49 U.S.C. § 1612(a), which requires "special efforts" to be made in planning and designing systems to make them accessible to the elderly and handicapped does not create a private cause of action for handicapped persons because it is "merely one part of a massive funding statute" the purpose of which is to assist development of mass transportation systems.

public system by using grant funds. Once such an arrangement is certified as "fair and equitable" by the Secretary of Labor, the labor requirements of UMTA are satisfied. UMTA is silent with regard to future contracts between employees and transit companies; it contains no reference to provisions that may be required in such future contracts; it does not set forth any substantive rules or regulations concerning the interpretation or construction of these subsequent agreements; it does not establish any administrative agency (such as the NLRB) to administer these subsequent contracts; nor does it contain any reference to the forum in which those agreements are to be enforced.

In this case, a § 13(c) Agreement was executed, certified by the Secretary of Labor as "fair and equitable" and incorporated in the federal grant contract in 1966, when Jackson continued the bus operations as a public function. Thus, the requirements of § 13(c) were fully satisfied. The principal purpose of § 13(c) is to assure that no employee's condition is worsened as a consequence of a federal grant. No harm has befallen any Jackson employee due to the 1966 grant.[15] It is obvious that § 13(c) has no relevance to the controversy between the parties.

Between 1966 and 1975, three new collective bargaining contracts, each of three years duration, were executed. From what appears in the record of this case, all those contracts were fully complied with. In 1975, a fourth contract was allegedly executed. It is this fourth contract, allegedly executed nine years after the 1966 federal grant

[15] Indeed, the employees received a clear benefit because they retained their employment. As the District Court noted: ". . . the [prior] private employer with which [the Union] had dealt prior to 1966 had already served notice of its intent to terminate business as of April 2, 1966, before the City's creation of [the Authority] . . . and . . . application for federal funds under UMTA. . . . [The Union] would have, absent such action, no contract with any viable entity. . . ." (28-29a).

to Jackson, which was allegedly breached by Jackson. For the alleged breach of that 1975 contract, the Union filed suit in federal court.

There is no question that the Union, or its members, may sue in state court to enforce these contracts. But, may they do so in federal court in the absence of any Congressional intent to create a federal transit labor law and in the absence of any federal statutes or regulations which govern the interpretation or construction of this private contractual arrangement? The Sixth Circuit answered this question affirmatively. In so doing, it erred and misconstrued this Court's decisions with respect to the enlargement of federal court jurisdiction by mere implication of a private federal cause of action from federal statutes that contain no expression that such was Congress' intent.

> Under Art. III, Congress alone has the responsibility for determining the jurisdiction of the lower federal courts. As the Legislative Branch, Congress also should determine when private parties are to be given causes of action under legislation it adopts. As countless statutes demonstrates, including titles of the Civil Rights Act of 1964, Congress recognizes that the creation of private actions is a legislative function and frequently exercises it. *When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction.*

Cannon v. University of Chicago, 441 U.S. 677, 730-31 (1979) (Justice Powell, dissenting) (emphasis added).

The Sixth Circuit applied the four part test of *Cort v. Ash,* 422 U.S. 66 (1975), to buttress its conclusion that the Union had a federal cause of action to enforce these purely local contracts, even though the Court acknowledged that UMTA lacked any express statutory language to that effect and that "[t]he legislative history of Section 13(c) is

simply not explicit. Our review of the Congressional debates establishes that the precise means of enforcing Section 13(c) agreements was not discussed." (10a). Despite this lack of evidence of Congressional intent, the Court of Appeals nevertheless implied a federal remedy.

The Sixth Circuit's decision reflects the tendency of certain lower federal courts to reach conclusions contrary to those reached by this Court with respect to implication of federal remedies. One such case is *Division 1287, Amalgamated Transit Union v. Kansas City Area Transportation Authority*, 582 F.2d 444 (8th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979). The Union there sought to compel the transit authority to engage in "interest" arbitration. The Eighth Circuit, conceding that the question ". . . is not free from doubt . . .", *id.* at 450, held that a controversy concerning the alleged breach of an UMTA § 13(c) agreement is one that "arises under the laws of the United States," although it did not directly address the question of whether a private federal right of action can be properly implied from UMTA. This Court denied certiorari in the Kansas City case early in 1979.

Following the lead of the Eighth Circuit in the Kansas City case after the denial of certiorari, two other circuits have also found that federal question jurisdiction exists to determine controversies concerning § 13(c) agreements.[16]

[16] In *Local Div. 519, Amalgamated Transit Union v. LaCrosse Mun. Transit Util.*, 585 F.2d 1340 (7th Cir. 1978), the court found that federal subject matter jurisdiction existed and that § 13(c) created a private federal cause of action, citing the Kansas City case for support. The court in *Local Div. No. 714 v. Greater Portland Transit Dist.*, 589 F.2d 1 (1st Cir. 1978) also held that there was federal question jurisdiction, citing both the Kansas City and LaCross decisions. Applying the four part *Cort* test, the Portland Court held that a private federal cause of action may be implied from UMTA. See also, *Division 580, Amalgamated Transit Union v. Central N.Y. Regional Transit Auth.*, 556 F.2d 659 (2d Cir. 1977), a case involving a § 13(c) agreement decided before the Kansas City case, in which no

Since the denial of certiorari in the Kansas City case, however, this Court has decided a number of cases that reveal the error of these Courts of Appeals opinions. Mr. Justice Powell, in his dissenting opinion in *Cannon v. University of Chicago*, 441 U.S. at 740-42, succinctly pointed out that the lower federal courts were too apt to create private federal causes of action under the *Cort* analysis, in cases dealing with § 13(c) of UMTA as well as in cases dealing with many other statutes.

> That the *Cort* analysis too readily permits courts to override the decision of Congress not to create a private action is demonstrated conclusively by the flood of lower court decisions applying it. Although from the time *Cort* was decided until today this Court consistently has turned back attempts to create private actions, (citations omitted) . . ., other federal courts have tended to proceed in exactly the opposite direction. In the four years since we decided *Cort*, no less than 20 decisions by the courts of appeals have implied private actions from federal statutes. *Local 714, Amalgamated Transit Union v. Greater Portland Transit District*, 589 F.2d 1 (CA 1 1978) (§ 13(c) of Urban Mass Transportation Act of 1964); (other citations omitted). . . . It defies reason to believe that in each of these statutes Congress absentmindedly forgot to mention an intended private action. Indeed, the accelerating trend evidenced by these decisions attests to the need to re-examine the *Cort* analysis.

This Court's numerous decisions subsequent to *Cannon*, make it clear that the central task is to ascertain Congressional intent. See *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16, 23-24 (1979) (no

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jurisdictional question was discussed. However, the court did note that "[t]he statute's legislative history makes it reasonably clear that § 13(c) was intended to preserve the rights of employees under existing collective bargaining agreements and to maintain the *status quo* with respect to the employer's obligation to bargain collectively, *not to create new rights for the employees or enhance existing ones*. 88 Cong. Rec. 5670-5677 (1963)." *Id.* at 662 (emphasis added).

implied private cause of action under § 206 of Investment Advisers Act of 1940); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-576 (1979) (no implied private cause of action under § 17(a) of Securities Exchange Act of 1934); *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 148-149 (1980) (no private cause of action under Federal Records Act or Federal Records Disposal Act); *Universities Research Association v. Coutu*, ___ U.S. ___, 101 S. Ct. 1451 (1981) (no implied private cause of action for back wages under Davis-Bacon Act); *Northwest Airlines, Inc. v. Transport Workers Union*, ___ U.S. ___, 101 S. Ct. 1571 (1981) (no implied right of contribution for employers against unions under Title VII of Civil Rights Act of 1964); *California v. Sierra Club*, ___ U.S. ___, 101 S. Ct. 1775 (1981) (no implied private cause of action under the Rivers and Harbors Appropriation Act); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, ___ U.S. ___, 101 S. Ct. 2061 (1981) (no implied right to contribution among defendants under federal antitrust laws); *Middlesex County Sewerage Authority v. National Sea Clammers Association*, ___ U.S. ___, 101 S. Ct. 2615 (1981) (no implied private cause of action under either Federal Water Pollution Control Act or Marine Protection, Research, and Sanctuaries Act of 1972).

In each of these cases, this Court has emphasized that "[t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action," *Touche Ross & Co., supra,* at 575; that the ultimate determination is "whether Congress intended to create the private remedy asserted," *Transamerica Mortgage Advisors, supra* at 15-16; and that "the key to the inquiry is the intent of the legislature," *Middlesex County Sewerage Authority, supra,* at 2622.

Given these cases, the error of the Sixth Circuit is clear. The Sixth Circuit itself recognized that there is no express reference to creation of a federal transit labor law in

UMTA. It also confirmed that the "Congressional debates [establish] that the precise means of enforcing Section 13(c) agreements was not discussed." (10a). Having so determined, under this Court's recent decisions, the Sixth Circuit should have affirmed the District Court's dismissal *in toto*. Instead, the Sixth Circuit erroneously applied the *Cort* test and created a federal cause of action which was never "discussed" by Congress.

But, the *Cort* factors are merely guides. The central inquiry is legislative intent. Once the Sixth Circuit recognized that neither the language of the statute, nor its legislative history, suggested that UMTA was intended to create a privately enforceable national transit labor law, it erred in utilizing the *Cort* factors to create such a right. The simple answer to the central inquiry of Congressional intent in this case is that there is "[no] evidence that Congress anticipated that there would be a private [federal] remedy", *California v. Sierra Club, supra,* at 1781, since, as the Sixth Circuit noted, such a remedy "was not discussed." (10a).

The purpose of UMTA is clear and belies any suggestion that UMTA was enacted for the purpose of creating new federal transit labor law. "Quite the contrary, the Act's language and structure demonstrate that it is a mere federal-state funding statute." *Pennhurst State School & Hospital v. Halderman,* ___ U.S. ___, 101 S. Ct. 1531, 1540 (1981). In determining if a statute creates a federal right, the Court must be guided by the entire law and not just a single sentence, or single portion, of that law. *Id.* UMTA is designed to "assist" and "encourage" states and localities to develop various mass transportation programs via federal grants. Only incidentally are the labor protective arrangements of § 13(c) mentioned, and § 13(c) itself does not unequivocally create a federal transit labor law. Thus, "nothing suggests that Congress intended the Act to be something other than a typical funding statute." *Id.* at 1542.

Since there is no evidence of any Congressional intent to create a federal transit labor law by enactment of UMTA, it was error for the Court of Appeals to read it into UMTA. As succinctly summarized by Mr. Justice White: "the focus of the inquiry is on whether Congress intended to create a remedy. (citations omitted) . . . The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California v. Sierra Club* ___ U.S. ___, 101 S. Ct. 1775, 1781 (1981). The Sixth Circuit decision engrafting such a remedy on UMTA was clearly erroneous. Because of the serious consequences of that error, should it be followed by other circuits, the Sixth Circuit's decision ought be reviewed by this Court.

II.

THIS CASE PRESENTS QUESTIONS OF GREAT PUBLIC IMPORTANCE.

The decision of the Sixth Circuit, if allowed to stand, would transfer to federal district courts the principal responsibility for adjudicating breach of contract claims between local public transit authorities and their employees. Under this rationale, the federal courts, rather than state courts, must determine the extent and nature of rights and obligations flowing to the parties to a purely private contractual agreement. The Court of Appeals held that § 13(c) of UMTA creates a private federal cause of action for Jackson employees even though (1) at the time of the complaint, Jackson had only received one small grant in 1966 and (2) the collective bargaining agreement allegedly breached by Jackson was executed by the parties more than nine years after the date of that grant.

The basis of the action before this Court is the interpretation and enforcement of a contract — a public sector labor agreement. There is no dispute or controversy in this case respecting the validity or construction of any

federal statute upon the determination of which the result in this case depends. There is no "pivotal" issue of federal law, essential to the decision of this case. There is no "federal common law" which governs any aspect of this dispute. In short, there is nothing more involved than a "garden variety" contract issue, which must be resolved in accordance with state contract law. This is precisely the sort of issue and case which is traditionally the domain of state courts.

If it should be determined that there is federal jurisdiction to review the making, maintaining, construction and enforcement of all collective bargaining agreements by transit authorities, then, in effect, the federal courts would be creating a federal transit labor law. The federal courts will have to review all aspects of transit labor relations without any legislative standards to use as guidelines for decision and without the supervision of any administrative agency, such as the NLRB.

But, "[t]here is no federal general common law." *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938). And federal courts have but very limited authority to formulate "federal common law". As Chief Justice Burger has noted:

> Rather, absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

Texas Industries, Inc. v. Radcliff Materials, Inc., ___ U.S. ___, 101 S. Ct. 2061, 2067 (1981).

There is no dispute that Congress did not expressly grant courts authorization to formulate substantive rules of decision in UMTA. Compare *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (construing § 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a)). And § 13(c) of UMTA does not raise any questions about obligations of the United States, or interstate and international disputes implicating the opposing rights of states or foreign nations. UMTA clearly does not raise any admiralty issues. In short, there is no warrant for creating a "federal common law" to govern transit labor relations.

Had Congress intended to preempt state contract law, to create a federal transit labor law and to place federal courts in a position of supervising transit labor relations, it would have done so explicitly, as it did in such federal statutes as the National Labor Relations Act, 29 U.S.C. § 151, the Labor-Management Relations Act, 29 U.S.C. § 141 and the Railway Labor Act, 45 U.S.C. § 151. Congress did not do so in UMTA.

It is the traditional function of a state to determine the legal consequences of a contract of employment made by local governmental units. Congress has long recognized the peculiarly local nature of state and municipal labor contracts. Thus, the National Labor Relations Act ("NLRA") provides that "the term 'employer' . . . shall not include . . . any state or political subdivision thereof . . . .", 29 U.S.C. § 152(2). There is absolutely no support in the language or legislative history that Congress intended, by enacting § 13(c) of UMTA, to effectively repeal § 152(2), and to create two classes of municipal employees — municipal transit employees who will be governed by federal labor law and all other municipal

employees who will continue to be governed by state labor law.

To read Congressional silence as sanction for an inference that UMTA created a federal transit labor law, which was intended to displace local laws and the long standing policy of the Congress as expressed in the NLRA, is therefore unsound, and in conflict with recent decisions by this Court. It also raises far-reaching issues of public importance.

"[T]o infer a cause of action based solely on federal law" in this case would countenance federal invasion of "an area basically the concern of the States" and "traditionally relegated to state law." *Cort v. Ash, supra,* at 78. Since this Court's decision in *National League of Cities v. Usery,* 426 U.S. 833 (1976) at least, it has been clear that "Congress may not exercise [its commerce] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." *Id.,* at 855.[17] The States' ability to make such decisions is "essential to [their] separate and independent existence . . . so that Congress may not abrogate the States' otherwise plenary authority to make them." *Id.* at 845-46. "One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what

[17] There is little question that public transit is an integral governmental function, within the meaning of *National League of Cities; see, e.g., Alewine v. City Council of Augusta,* 505 F. Supp. 880, 889 (S.D. Ga. 1981) (". . . the operation of the City Transit Department of Augusta is an integral operation of traditional governmental function."); *United Transp. Union v. Long Island R.R.,* 634 F.2d 19, 27 (2d Cir. 1980), *cert. granted,* ___ U.S. ___, 49 U.S.L.W. 3945 (1981), ("In sum, there are two grounds for finding the State's operation of a passenger rail service . . . to be an 'integral governmental function.' ").

compensation will be provided where these employees may be called upon to work overtime." *Id.* at 845. To permit Congress to infringe the States' power to make such decisions would "significantly alter or displace the States' abilities to structure employer-employee relationships. . . ." *Id.* at 851. To infer that Congress created a federal transit labor law when it enacted UMTA, therefore, raises serious constitutional issues under *National League of Cities,* questions which can easily be avoided if Congress' intent be faithfully followed.[18]

Congress acted carefully, in enacting the labor provision of UMTA, so as to avoid displacement of "the States' abilities to structure employer-employee relationships", *id.* at 851, or of "the States' freedom to structure integral operations in areas of traditional governmental functions", *Id.* at 852, which are "basically the concern of the States" *Cort v. Ash, supra,* at 78. Congress deliberately and repeatedly stated its intention, during debates and hear-

[18] Certiorari was granted on June 22, 1981, to review the Second Circuit's decision in *United Transp. Union v. Long Island R.R.*, 634 F.2d 19 (2d Cir. 1980), *cert. granted,* 49 U.S.L.W. 3945 (1981). The Second Circuit held that the Railway Labor Act ("RLA") permitting strikes could not constitutionally preempt New York's Taylor Act, which prohibited such strikes by state employees. The basis of the Second Circuit's holding is that the RLA may not be enforced so as to permit a strike because "it interferes with an integral state function, namely, the State's ability to structure employer-employee relationships in public commuter transportation," *Id.* at 23, and because it interferes with the states right to "make the 'fundamental employment decisions' that are essential to their 'separate and independent existence.'" *Id.* at 25. The Second Circuit also found that operation of passenger rail service was "an integral governmental function" because it is a service that local communities are "particularly suited to provide because of the community-wide need and it is a service they have [been caused] to provide by a process of economic elimination of private suppliers." *Id.* at 27.

Like the *Long Island Railroad* case, the instant case raises serious issues of federal-state relations and state control of labor-management relations in public mass transit systems.

ings on § 13(c) of UMTA that "specific conditions for worker protection will normally be the product of local bargaining and negotiation." [1964] U.S. Code Cong. & Ad. News 2584-2585.

The decision below radically departs from this Court's admonition against too easy implication of a federal cause of action from Congressional silence. The decision below implies a Congressional intent to create a federal transit labor law to displace governing state law and to substitute a federal court for state courts as the principal decision maker with respect to the interpretation and construction of local transit labor contracts.

Absent review by this Court, the effect of the decision below will be the transfer to the federal courts of a large number of cases involving no substantial question of federal law, the decisions in which will necessarily have to turn on state contract law. As a result of the enactment of UMTA, approximately 413 publically owned transit authorities employing approximately 132,000 transit workers have to this date entered into § 13(c) arrangements, and, thereafter, into collective bargaining agreements with local unions. Disputes among this large number of authorities and their employees over these collective bargaining agreements, arising in some instances many years after the date of federal assistance, will have to be adjudicated in federal courts if the decision below stands. The result is anomalous.

An already overburdened federal judiciary would be further burdened by the necessity of hearing and determining a large number of cases, none of which involve any issue save contract issues, which cases clearly can be more easily and appropriately resolved by a state court. As a consequence of this decision, and others like it in the

Courts of Appeals,[19] there have already been filed a large number of cases in District Courts involving collective bargaining agreements between public transit authorities and local unions.[20] Others, in great number, are sure to

[19] See, *e.g.*, *Division 1447, Amalgamated Transit Union v. Louisville and Jefferson County Transit Auth.*, No. 80-3203 (6th Cir. July 28, 1981); *Division 1235, Amalgamated Transit Union v. Metropolitan Transit Auth.*, 650 F.2d 1389 (6th Cir. 1981) (a companion case to the present petitioners' case); *Local Div. No. 714 v. Greater Portland Transit Dist.*, 589 F.2d 1 (1st Cir. 1978); *Local Div. 519, Amalgamated Transit Union v. LaCrosse Mun. Transit Util.*, 585 F.2d 1340 (7th Cir. 1978); *Division 1287, Amalgamated Transit Union v. Kansas City Area Transp. Auth.*, 582 F.2d 444 (8th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979); *Division 580, Amalgamated Transit Union v. Central N. Y. Regional Transit Auth.*, 556 F.2d 659 (2d Cir. 1977) (no jurisdictional question discussed).

[20] See, *e.g.*, *Local Div. 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Auth.*, No. C81-774A (N.D. Ga. June 24, 1981) (suit to enforce arbitration award); *Local Div. 589, Amalgamated Transit Union v. Mass.*, 511 F. Supp. 312 (D. Mass. 1981) (interest arbitration); *Division 788, Amalgamated Transit Union v. Bi-State Dev. Agency of the Missouri-Illinois Metropolitan Dist.*, No. 80-1339-C(4) (E.D. Mo. Feb. 26, 1981) (dismissed per stipulation); *Division 174 and Div. 1037, Amalgamated Transit Union v. Southeastern Regional Transp. Auth.*, No. 80-2427-S (D. Mass. Feb. 25, 1981) (preliminary injunction to compel interest arbitration); *Division 587, Amalgamated Transit Union v. Municipality of Metropolitan Seattle*, No. C80-1227M (W.D. Wash. Dec. 19, 1980), *appeal docketed*, No. 80-3235 (9th Cir. 1980) (compelling interest arbitration); *Local Div. 1235, Amalgamated Transit Union v. Metropolitan Area Transit Auth.*, Nos. 80-3452 and 79-3275 (M.D. Tenn. Oct. 16, 1980), *appeal docketed*, No. 80-5397 (6th Cir. 1980) (enforcing arbitration award); *Local Div. 732 Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Auth.*, No. C80-1601A (N.D. Ga. Oct. 2, 1980) (construing contract to determine alleged unilateral violation of clause limiting overtime); *Division 1575, Amalgamated Transit Union v. Golden Gate Bridge, Highway and Transp. Dist.*, No. C-79-2278 WHO (N.D. Cal. May 27, 1980) (construing contract, union shop agreements); *Division 1287 v. Kansas City Area Transp. Auth.*, No. 77-0663-CV-W-2 (W.D. Mo. Feb. 21, 1980) (federal law must be used to interpret pension claim under § 13(c) contract); *Division 1212, Amalgamated Transit Union v. Chattanooga Area Regional Transp. Auth.*, 483

follow.[21] So far reaching a consequence was not intended by Congress, and review by this Court, at this time, is necessary to determine this question.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit in this case.

Respectfully submitted,

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F. Supp. 37 (E.D. Tenn. 1979) (interest arbitration); *Division 1177, Amalgamated Transit Union v. Tidewater Transp. Dist. Comm'n*, No. 79-968-N (E.D. Va. Nov. 8, 1979) (interest arbitration); *Division 1309, Amalgamated Transit Union v. San Diego Transit Corp.*, No. 78-1093-E (S.D. Cal. Jan. 9, 1979) (compelling arbitration).

[21] Federal Courts have recently become involved in local transit fare increase disputes, *see, City of Atlanta v. MARTA*, 506 F. Supp. 883 (N.D. Ga. 1980), *aff'd*, 636 F.2d 1084 (5th Cir. 1981) and *Andrechek v. Port Auth. of Allegheny Co.*, (W.D. Pa. Civil No. 80-222), as well as local transit service cut disputes. See *Cohen v. MBTA* (D.C. Mass. No. 81-791), *aff'd*, ___ F.2d ___ (1st Cir., Apr. 21, 1981).

Appendix

APPENDIX

In the

United States Court of Appeals

for the Sixth Circuit

No. 78-1185

Local Division 1285, Amalgamated Transit Union, AFL/CIO/CLC,

Plaintiff-Appellant,

v.

Jackson Transit Authority and the City of Jackson; William T. Coleman, Jr. and William J. Usery, in their official capacities,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Tennessee.

Decided and Filed June 3, 1981

Before: MERRITT, KENNEDY, and MARTIN, Circuit Judges.

MARTIN, Circuit Judge, delivered the opinion of the Court, in which KENNEDY, Circuit Judge, joined. MERRITT, Circuit Judge, (pp. 17a-20a) filed a separate dissenting opinion.

MARTIN, Circuit Judge, This appeal requires us to decide whether Section 13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 1601 *et seq.*, ("UMTA"), creates a private federal cause of action for employees of local transit authorities which have received federal funds under the Act. We must also determine whether either the Secretary of Labor or the Secretary of Transportation has a statutory duty to enforce the terms of a "labor protective arrangement" executed pursuant to Section 13(c) of the Act. 49 U.S.C. § 1609(c).

In 1966, the City of Jackson, Tennessee applied for a federal grant to facilitate conversion of a failing private bus company into a public transit authority. As a condition of federal funding, Section 13(c) requires grant recipients to make "arrangements" for the protection of their employees' interests:

> It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

In order to qualify for a grant, Jackson Transit Authority entered into a "Section 13(c) agreement" with Local Division 1285, Amalgamated Transit Union, the collective bargaining agent for the transit employees. That agreement was duly submitted to the Secretary of Labor, who certified that it met the "fair and equitable" standard of Section 13(c). In accordance with Section 13(c)(5), the substance of this "arrangement" was incorporated in the grant contract between Jackson and the United States.

From 1966 until 1975, Jackson and the Union negotiated and honored a series of collective bargaining agreements. In 1975, however, Jackson allegedly repudiated its current collective bargaining contract and unilaterally reduced certain employee benefits. The Union, through its International president, sought determinations by the Secretaries of Labor and Transportation that Jackson had breached its obligation under Section 13(c) to continue collective bargaining. Both Secretaries refused to issue such a finding, whereupon the Union initiated this action.

In its complaint, the Union sought: 1) monetary and injunctive relief against Jackson; and 2) mandamus relief against the Secretaries. Jackson moved for dismissal on jurisdictional grounds; the Secretaries also moved for dismissal, or in the alternative, for summary judgment.

The District Court heard oral argument on the defendants' motions. On December 22, 1977, the court issued an order and memorandum opinion dismissing the complaint for lack of federal jurisdiction. That decision is reported at 447 F. Supp. 88.

On appeal, the Union argues that the court should have exercised jurisdiction over the controversy and inferred a private federal right of action against the transit authority from Section 13(c) of the Act. We agree. We reject, however, the Union's further claim for relief in the nature of mandamus against the Secretaries of Labor and Transportation.

I. The Complaint against Jackson.

A. Federal Jurisdiction.

The District Court dismissed the case for lack of federal jurisdiction. We disagree both with the court's analysis and its conclusion. The opinion below proceeds on the assumption that subject matter jurisdiction under 28 U.S.C. § 1331 is contingent upon the availability of a private federal remedy under Section 13(c). That approach is inconsistent with the analysis required by the Supreme Court in *Bell v. Hood,* 327 U.S. 678 (1946).

Bell v. Hood emphasized the distinction between the threshold ascertainment of "arising under" jurisdiction and the question whether the plaintiff in a given case has stated a claim upon which relief can be granted:

> Jurisdiction, therefore, is not defeated . . . by the possibility that the averments (of the complaint) might fail to state a cause of action upon which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action upon which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. 327 U.S. at 682.

Our first determination, therefore, must be whether the Union's claim "arises under" the laws of the United States within the meaning of Section 1331. If it does, then federal jurisdiction obtains unless the claim is "immaterial," or "wholly insubstantial and frivolous," made "solely for the purpose of obtaining jurisdiction," *Id.* at 682. Section 1331 also requires a minimum amount in controversy of $10,000.00.

It is axiomatic that for purposes of federal jurisdiction an "action" is defined in terms of the *right asserted,* not the remedy sought. *Cohens v. Virginia,* 6 Wheat. 264, 379

(1821). Furthermore, the federal right asserted must be an *essential* element of the plaintiff's cause of action. *Gully v. First National Bank*, 299 U.S. 109, 112 (1936); *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 127 (1974).

In the instant case, the Union contends that Jackson, by disavowing an existing collective bargaining contract and by taking subsequent unilateral actions, has jeopardized a right guaranteed to transit employees by a federal statute.

Jackson, on the other hand, emphasizes the "private" nature of the Section 13(c) contract and advances the District Court's conclusion that the Union's complaint is "essentially a state breach of contract claim." In support of this position it cites *McFaddin Express, Inc. v. Adley Corp.*, 346 F.2d 424 (1965), in which the Second Circuit declared itself without jurisdiction to enforce a temporary management contract between two regulated interstate carriers. The plaintiff in *McFaddin* brought an action in federal court for breach of that contract, relying for jurisdiction on an Interstate Commerce Commission order which "authorized" one carrier to manage the other for a period of six months. The court based its finding of no jurisdiction on: 1) the permissive rather than mandatory nature of the I.C.C. order; and 2) the absence of any "national interest" in the contract such that "federal principles (would) control the disposition of the case." However, we will demonstrate that neither ground of the *McFaddin* holding applies here.

Jackson's assertion that the United States is not a party to the Section 13(c) agreement is correct but irrelevant; the decisive factor is that the agreement is so intertwined with the federal statutory scheme that the rights it secures cannot be dismissed as "merely private." Not only does the statute require applicants to execute labor protective arrangements, but it also specifies a number of provisions those arrangements must include. One such mandatory provision is a guarantee than transit employees will enjoy continued collective bargaining rights after their private employer becomes a public authority.

Moreover, the relationship of the Section 13(c) agreement with the federal scheme does not end with the negotiations of an "arrangement" between two private parties. On the contrary, Section 13(c) specifically states that no federal funds will be made available until the Secretary of Labor certifies that the agreement is "fair and equitable." Furthermore, the terms of the Section 13(c) agreement must appear in the grant contract between the United States and the grant recipient.

Thus, in contrast to the contract in *McFaddin*, the Section 13(c) agreement is a mandatory means of preserving rights created by a federal statute. That Congress chose a "private" arrangement as the vehicle for protecting transit employees does not negate the fundamentally "federal" character of the rights it perpetuates. Inasmuch as the "right asserted" in this case derives from a federal statute, we can only conclude that the Union's claim "arises under" the laws of the United States. Similarly, this action is neither "insubstantial" nor "frivolous" within the meaning of *Bell v. Hood, supra.*

Because Jackson does not suggest that the Union's claim involves less than $10,000.00, we shall deal summarily with the question of the amount in controversy. The Union plainly meets the standard established in *Saint Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938):

> [U]nless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less the jurisdictional amount to justify dismissal.

In light of these determinations, we hold that the District Court erred in dismissing this case for lack of federal jurisdiction. Our conclusion finds support in three Circuit Court decisions in actions nearly identical to this one. *Local Division No. 714 v. Greater Portland Transit District,* 589 F.2d 1 (1st Cir. 1978); *Local Division 519,*

Amalgamated Transit Union v. LaCrosse Municipal Transit Utility, 585 F.2d 1340 (7th Cir. 1978); *Division 1287, Amalgamated Transit Union v. Kansas City Area Transportation Authority*, 582 F.2d 444 (8th Cir. 1978), *cert. denied*, 99 S. Ct. 872 (1979). Each of those cases dealt with alleged breaches of Section 13(c) agreements by grant recipients. In each instance, the Court of Appeals upheld federal jurisdiction. We can discern only one significant distinction between these cases and the dispute before us. To the extent that this distinction has any effect at all, it strengthens the argument in favor of federal jurisdiction here. In every previous case, the plaintiff Union sought federal court enforcement of interest arbitration provisions contained in a Section 13(c) agreement. Unlike continued collective bargaining rights, interest arbitration is not explicitly required by the statute. Thus, for the other courts, whether or not the right to interest arbitration "arose under" federal law was a closer question than is our analogous inquiry into the source of continued collective bargaining rights.

International Assoc. of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963), a leading Supreme Court case on federal question jurisdiction, lends further support to our conclusion. *Central Airlines* arose from Section 204 of the Railway Labor Act, 45 U.S.C. § 184, which requires airlines and their employees' unions to establish, by private contract, airline boards of adjustment. The board of adjustment to which Central Airlines was subject was empowered by the contracting parties to resolve certain labor disputes and to make final and binding awards. Central refused to comply with one such award and the employees' union sought enforcement in federal court. The Supreme Court held that the action to enforce the award "arose under" federal law and gave rise to federal question jurisdiction:

> The contracts and the adjustment boards for which they provide are creations of federal law and bound to the statute and its policy. If any provision contained in a § 204 contract is enforceable, it is because of

> congressional sanction: "[T]he federal statute is the source of the power and authority. . . . The enactment of the federal statute . . . is the governmental action . . . though it takes a private agreement to invoke the federal sanction . . . A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it . . . That is, the § 204 contract, like the Labor Management Relations Act § 301 contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts. 372 U.S. at 692. (citation omitted.)

Jackson attempts to distinguish *Central Airlines* by noting that the Supreme Court's decision was informed by the "national interest" in preserving stable labor relations in the airline industry. That argument, however, does little to advance Jackson's cause. First, the legislative history of UMTA reveals a similar policy behind the enactment of Section 13(c). *See* 109 *Cong. Rec.* 5670. Second, as Judge Doyle stated: the "purpose (of the Railway Labor Act) in no way controls the explicit and limited decision regarding federal subject matter jurisdiction." *Local Division 519 v. LaCrosse Municipal Trans., supra,* at 807.

B. The Implied Cause of Action.

We turn now to discuss whether the Union has a private federal remedy under Section 13(c). The statute itself is silent on the question. We must therefore decide whether such a remedy arises by implication.

The Seventh Circuit had no difficulty resolving this issue:

> We agree with Judge Doyle's statement: "Congress intended that the contracts embodying the 'fair and equitable arrangements' were to be enforceable contracts. It would be fatuous to suggest otherwise. Because the contracts were to be enforceable, it follows that they were to be enforced at the instance of the parties to the contracts." 445 F. Supp. at 811.

> Based upon this premise, it follows that since the test for federal question jurisdiction has been met the remedy lies in federal court. The statutory scheme outlined in the Urban Mass Transportation Act and the policy underlying § 13(c) of the Act implies a federal private remedy. Support for this holding is found in *Central Airlines*. There the Court implicitly recognized the existence of a federal private remedy. 585 F.2d at 1349-50.

The court went on to state that an analysis under *Cort v. Ash*, 422 U.S. 66 (1975) is "unnecessary." *Id.* at 1350.

Whether necessary or not to this decision, an inquiry similar to that in *Cort* reinforces our conclusion that this action is properly in federal court. *See Chartwell Communications Group v. Westbrook*, No. 80-1566 (6th Cir. filed December 29, 1980); *Curran, et al v. Merrill Lynch, Pierce, Fenner and Smith*, 662 F.2d 216 (6th Cir. 1980). *Cort* identified four characteristics of an implied cause of action:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916) (emphasis supplied) — that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, *e.g., National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458, 460 (1974) (Amtrak). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, *e.g, Amtrak, supra; Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 423 (1975); *Calhoon v. Harvey*, 379 U.S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? See *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963); cf. *J. I. Case Co. v. Borak*, 377 U.S. 426, 434 (1964); *Bivens v. Six Unknown Federal Narcotics*

> *Agents*, 403 U.S. 388, 394-395 (1971); *id.*, at 400 (Harlan, J., concurring in judgment). 422 U.S. at 78.

Of these four factors, legislative intent is the most significant. *Touche Ross v. Redington*, 442 U.S. 560 (1979); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 62 L. Ed. 2d 146 (1979); *Taylor v. Brighton Corp.*, 616 F.2d 256 (6th Cir. 1980).

Section 13(c) clearly satisfies the first *Cort* test. That provision was enacted for the "especial" benefit of transit employees and, as we have already held, creates federal rights on their behalves.

The Union's argument is further substantiated when we apply the second and third *Cort* criteria — legislative intent, "explicit or implicit," and consistency with the overall statutory scheme. The legislative history of Section 13(c) is simply not explicit. Our review of the Congressional debates establishes that the precise means of enforcing Section 13(c) agreements was not discussed. However, as Judge Doyle remarked:

> Of course, the best key to construction of § 13(c), so obvious in my view as to be dispositive of the issue, is that § 13(c) clearly contemplates contracts as the vehicles embodying the "fair and equitable" arrangements; that contracts are meant to be enforceable, not unenforceable; and that enforceability means the existence of some remedy in some forum. 445 F. Supp. at 817.

The Act offers no administrative solution to the problem of enforcing Section 13(c) agreements. By contrast, the implementation of certain other provisions of the statute is specifically delegated to the Department of Transportation. Unless we impute to the Secretary of Transportation the responsibility for handling labor relations disputes — an incongruous result which we decline to reach without a clear Congressional directive — we are left, if only by default, with an implied private cause of action. *See Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th

Cir. 1977). We do note, however, that if the Act had provided any administrative mechanism under Section 13(c), our resolution of this issue might have been altogether different. *Transamerica Mortgage Advisors, Inc. v. Lewis, supra; Taylor v. Brighton Corp., supra; Bradford School Bus Transit, Inc. v. Chicago Transit Authority*, 537 F.2d 943 (7th Cir. 1976).

The only question remaining is whether proceedings to enforce Section 13(c) agreements must be relegated to state court, as the District Judge held, or whether Congress intended to permit plaintiffs to sue in federal court. Jackson invokes the fourth *Cort* test, asserting that municipal employee labor relations are "traditionally" the province of state law.

In this context, it is important to remember that Jackson's transit employees were covered by the National Labor Relations Act while the employer was a private bus company. When, however, the employer became a municipal agency, N.L.R.A. coverage ended. 29 U.S.C. § 152(2). Congress was well aware of the potential problems this transition could create, and enacted Section 13(c) to ensure that federal funds would not be used to deprive transit employees of certain benefits they had long enjoyed:

> The principle of protecting workers affected as a result of adjustments in an industry carried out under the aegis of Federal law is not new, particularly in the transportation industry. Thus, railroad employees for years have enjoyed Federal protection against adverse effects attendant upon railroad consolidations. The problems of worker protection presented by the bill are not necessarily identical to those presented under other laws. The committee believes, however, that workers for whom a standard of benefits has already been established under other laws should receive equally favorable treatment under the proposed new program. The committee also believes that all workers adversely affected by adjustments under the bill should be fully protected in a fair

> and equitable manner, and that Federal funds should not be used in a manner that is directly or indirectly detrimental to legitimate interests and rights of such workers. U.S. Code of Congressional and Administrative News 1964, Vol. 2 at 2569, 2584.

It is indisputable that Section 13(c) reflects *national* labor policy. *See* 109 *Cong. Rec.* 5670. Indeed, the legislative history reveals that several senators were concerned about possible conflicts between Section 13(c) and state law, particularly in the area of the right to strike. *Id.* at 5672-73. Senator Morse, the chief sponsor of the bill which became Section 13(c), assured his colleagues that state laws forbidding public employee strikes would supercede national labor policy, but *only* where the right to strike was concerned; *all other* collective bargaining rights would be protected. *Id.* at 5671-73. Senator Morse made the following comments on the bill:

> It is impossible to satisfy all Senators. The reason why it is impossible to satisfy them all is that we cannot satisfy each instance and protect the Federal policy, because some changes are going to have to be made in some of the States to conform to the Federal policy.
>
> I do not think there would be any great wrong done if we simply said to a State "You do not qualify for this Federal grant." It does not mean they are entitled, as a matter of right, to the Federal grants irrespective of the fact that they are not following a policy that is in conformity with a Federal policy . . . . *Id.* at 5675.

Jackson points out, correctly, that Section 13(c) was designed to encourage flexibility in formulating labor protective "arrangements." Senator Morse himself suggested that if local law prohibits collective bargaining by municipal employees, alternative solutions such as entrusting management of the transit authority to a private commission which *could* legally bargain with the union might be explored. *See also* Department of Labor Guidelines, 43 F.R. 13558 (3-31-78). The point, of course, is not

that Congress was willing to make allowances for local problems. Rather, the point is that to qualify for federal funds, municipalities *must,* one way or another, undertake to protect the collective bargaining rights required by national labor policy.

In summary, the rights Section 13(c) preserves are federal rights. In *Transamerica Mortgage Advisors, Inc. v. Lewis, supra,* the Supreme Court found that Section 215 of the Investment Advisors Act creates a limited private right of action. In determining the appropriate forum for such an action, the Court observed:

> One possibility, of course, is that Congress intended that claims under § 215 would be raised only in state court. But we decline to adopt such an anomalous construction without some indication that Congress in fact wished to remit the litigation of a federal right to the state courts. 444 U.S. at 20, n.8.

Applying that approach to the present case, we hold that the Union is entitled to pursue its claim in federal court.

In reaching this decision, we note a recent tendency on the part of the Supreme Court to limit the inference of private actions from federal statutes. In *Touche Ross v. Redington, supra,* Justice Rehnquist was explicit on this point:

> To the extent our analysis in today's decision differs from that of the Court in *Borak,* [*J. I, Case Co. v. Borak,* 377 U.S. 426 (1964)], it suffices to say that in a series of cases since *Borak* we have adhered to a stricter standard for the implication of private causes of action, and we follow that stricter standard today . . . The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve on the statutory scheme that Congress enacted into law. 442 U.S. at 578. (citation omitted.) *See also Transamerica Mortgage Advisors, Inc. v. Lewis, supra.*

A careful reading of those cases, however, persuades us that neither *Touche Ross* nor *Transamerica* requires a different result here.

In *Touche Ross,* the Court declined to infer a private right of action from Section 17(a) of the Securities Exchange Act of 1934, which requires broker-dealers to maintain certain records and file certain reports with the SEC. The Court emphasized that Section 17(a) neither grants private rights to the members of an identifiable class, nor prohibits specific conduct. 442 U.S. at 569. Here, by contrast, we have already found that Section 13(c) of the Act does confer federal rights on transit employees, including the right to continued collective bargaining.

Transamerica involved not only Section 215 of the Investment Advisors Act, noted above, but Section 206 of that statute as well. The Court held that Section 206 does not imply a private cause of action. Unlike the statute in *Touche Ross,* Section 206 does explicitly prohibit investment advisors from engaging in certain fraudulent practices. Concededly, it was enacted for the protection of investment advisors' clients. However, the Court makes clear that the dispositive issues in *Transamerica* were the overall statutory scheme, which includes no fewer than three enforcement provisions yet omits any reference to private suits, and the legislative history, which strongly suggests that Congress did *not* intend to imply a private right of action. No such benchmarks appear in the present case. We have found nothing in the Act or its history which indicates that Congress intended to deny transit employees an opportunity to enforce their federal rights in federal court.

II. The Union's Claim against the Secretaries of Labor and Transportation.

We begin our discussion of this final issue by pointing out that the threshold inquiry is whether either Secretary has a statutory duty to enforce Section 13(c) agreements

on behalf of transit employees. If no such duty exists, our analysis need go no further.

The Act makes only two references to the role of the Secretary of Labor. Sections 3(e)[1] and 13(c) require the Secretary, as part of the grant approval process, to certify that labor protective arrangements are "fair and equitable." Neither section intimates that the Secretary is expected to supervise the conduct of the parties after an acceptable agreement is reached and the grant disbursed. According to the Union, however, "it stands to reason" that the Secretary should also bear continuing responsibility for enforcing the terms of Section 13(c) agreements. Whether or not we agree with the policy behind the Union's position, we decline to substitute our judgment on the issue for that of Congress.

The legislative history affords the Union no more support than does the statute itself. In the course of the Senate and House Hearings on the bill, then-Secretary of Labor Wirtz referred to the "administration" of Section 13(c). On each occasion, however, his remarks were made in the context of formulating guidelines for "fair and equitable" arrangements. Senate Hearings on S.6, 88th Congress, 1st Sess. at p. 309. *See also* S.Rep. 2, 88th Cong., 1st Sess. 28; H.R.Rep. #204, 88th Cong., 1st Sess. 16.

Unlike the Secretary of Labor, the Secretary of Transportation does have several specific enforcement obligations under the Act. Section 3(f), 49 U.S.C. § 1602(f), for example, explicitly requires him to supervise *and* enforce protective arrangements which ensure that federal grants will not be used to force private charter bus operators out of the competitive market. Similarly, Section 3(g), 49

[1] Section 3(e) of the Act (49 U.S.C. 1602(e)) provides in pertinent part:

> No financial assistance shall be provided under this chapter to any State or local public body . . . unless . . . (4) the Secretary of Labor certifies that such assistance complies with section 1609(c) [Section 13(c)] of this title.

U.S.C. § 1602(g) requires an agreement by grant recipients not to engage in school bus operations except under limited circumstances. Again, the Secretary of Transportation has specific enforcement duties. To administer his responsibilities in the areas of school and charter bus operations, the Secretary has promulgated extensive regulations which include provisions for judicial review of agency action in accordance with the Administrative Procedure Act. 49 C.F.R. 604.1 *et seq.;* 49 C.F.R. 605.1 *et seq. See also Bradford School Bus Transit, Inc. v. Chicago Transit Authority, supra.*

With respect to Section 13(c), however, we are unable to conclude that Congress has imposed mandatory enforcement duties on the Secretary of Transportation. In the first place, the only administrative official ever mentioned in that section is the Secretary of Labor, whose limited role we have already discussed. It would be unreasonable to assume that Congress intended to require the Department of Transportation to resolve labor relations disputes, yet neglected to say so despite its explicit mandate under other sections of the statute. Furthermore, we have discovered nothing in the legislative history to indicate that Congress contemplated the result the Union seeks here. This statute was enacted eighteen years ago, yet nothing in the record before us suggests that the Secretary of Transportation has ever assumed responsibility for enforcing the terms of labor protective agreements. This factor alone is scarcely dispositive of the issue. However, it is not unlikely that Congress would have amended Section 13(c) had it perceived a need for active enforcement by the Department of Transportation. Indeed, Congress did respond to just such a need when it added Section 3(f), discussed above, to the Act in 1974.

We are aware that the First Circuit has indicated a belief that the Secretary of Transportation has at least discretionary authority to enforce labor protective arrangements by virtue of Section 12(e) of the Act. [49 U.S.C. § 1608(e)]. *Local Division 714 v. Greater Portland*

Transit District, supra. It stopped short of deciding that transit employees can compel the Department of Transportation to take action, although it characterized that possibility as "plausible." 589 F.2d at 14. It is impossible to determine from *Greater Portland* whether our decision here actually conflicts with the law in the First Circuit, since that court's analysis was purely hypothetical. The Secretary of Transportation was not a party to that case, and the question of administrative enforcement of Section 13(c) was not at issue. Instead, the First Circuit offered its interpretation of the Secretary's statutory role as one of several arguments in favor of inferring a private federal cause of action on behalf of the plaintiff union.

In any event, the Union has failed to demonstrate a sufficient reason to compel the Secretary of Transportation to take action in this controversy. In the absence of a clear Congressional mandate, we decline to force the Department of Transportation to supervise labor-management relations.

The judgment of the District Court dismissing the Union's claim against Jackson is reversed and remanded for proceedings consistent with this opinion. The judgment dismissing the claim against the Secretaries for lack of jurisdiction is reversed with instructions to enter a judgment dismissing the claim for failure to state a cause of action upon which relief can be granted.

MERRITT, Circuit Judge, dissenting. The key question in this case is whether § 13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 1601 *et seq.* (1976), a grant program established in 1964, creates a private federal right of action for breach of contract for employees against local municipal transit authorities receiving federal funds. Section 13(c) provides that there shall be no federal funding under the Act in the absence of "fair and equitable arrangements . . . as determined by the Secretary of Labor, to protect the interests of employees affected by" the program. The section goes on to say that "[s]uch

protective arrangements shall include . . . provisions" respecting topics such as the "preservation" and "continuation" of collective bargaining rights and prevention of "a worsening" of employee rights. The section says that "[t]he contract for the granting of any such assistance shall specify the terms and conditions of the protective [employee] arrangements." 49 U.S.C. § 1609(c).

In this case the municipal transit authority allegedly decided after a collective bargaining agreement had been in effect for several months not to abide by portions of the agreement that required cost of living increases. The employees sued the city in federal court for enforcement of their contract.

Last week the Supreme Court decided another in a long line of private right of action cases. It unanimously held that § 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, does not create a private right of action, *California v. Sierra Club,* 49 U.S.L.W. 4441 (Nos. 79-1252, 79-1502, April 28, 1981). Our Court had previously decided the question the other way. *Norfolk & Western Co. v. United States,* 641 F.2d 1201 (6th Cir. 1980). The concurring opinion in the *Sierra Club* case by Justice Rehnquist for himself, the Chief Justice, and Justices Stewart and Powell, observes that courts of appeals are continuing to analyze the private right of action problem incorrectly and to imply too much — in "five of the last six statutory implied right of action cases" creating a new action the "analysis by the Courts of Appeals" has been wrong, 49 U.S.L.W. at 4445.

The opinion for the court in the *Sierra Club* case, written by Justice White, emphasizes that the inquiry in such cases is now fairly narrow:

> As recently emphasized, the focus of the inquiry is on whether Congress intended to create a remedy [citing recent cases]. The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide. 49 U.S.L.W. at 4444.

Although Congress intended to have the Secretaries of Labor and Transportation protect the interests of transit employees as a class, I do not see in this statute or its legislative history that Congress intended to create a new, original, federal, private right of action for breach of contract claims. The Secretary of Transportation can withhold funds, or perhaps the Secretary of Labor can take administrative steps, if they disapprove of the city's conduct toward its transit employees. The Secretary of Transportation can sue to enforce his agreement with a municipality. 49 U.S.C. § 1608(a). But there is nothing in the statute itself or the committee reports and debates that even hints that Congress contemplated that federal courts would decide what contractual rights should be preserved and what salary and fringe benefits are "fair and equitable" when a municipal transit worker is aggrieved by the action of his employer. There is a large number of bus drivers in the country, and Congress wanted them to know that it had considered their interests and authorized some administrative protection. But this does not mean that Congress intended to engraft a judicial remedy on the statute. Congress has not provided a principle or rule of decision for us to administer in such cases — other than general fairness. There is at stake no clearly enunciated national policy relating to municipal employee relations. There is no reason to think that state courts in the performance of their traditional, common law role cannot decide these private breach of contract cases just as fairly and just as efficiently as federal courts.

In the

United States District Court,

W.D. Tennessee, E.D.

No. C-76-104-E

Local Division 1285, Amalgamated Transit Union, AFL/CIO/CLC,

Plaintiff,

v.

Jackson Transit Authority, the City of Jackson, William T. Coleman, Jr., Secretary of Transportation, and William J. Usery, Secretary of Labor, United States Department of Labor,

Defendants.

Decided and Filed Dec. 23, 1977

MEMORANDUM OPINION

WELLFORD, District Judge.

Plaintiff, an unincorporated labor organization, claims a violation of the Urban Mass Transit Act, 49 U.S.C. § 1601 *et seq.* (hereafter UMTA) and more particularly asserts that a contract required under 49 U.S.C. § 1609(c) has been violated by the City of Jackson, Tennessee (hereafter City), and its municipal transit authority. Plaintiff further claims that the United States Secretaries of Transportation and Labor have failed to carry out their responsibilities under this law. The federal officials have filed a motion to dismiss and/or for summary judgment, and the City and the Jackson Transit Authority (hereafter JTA) have likewise filed a motion to dismiss. After considera-

tion of the matters submitted by the respective parties, oral argument, reconsideration of an earlier Opinion in this case[1], and the entire record, the Court has concluded that defendants' motions are well taken for the reasons indicated.

Plaintiff is the duly designated collective bargaining representative of JTA employees. This dispute arises out of a 1966 grant application by the City under UMTA for financial assistance in the operation of its public bus transit system. A labor agreement was executed in 1966 as required by the Act between plaintiff and JTA, and a grant was approved to the City. Plaintiff now claims that the City and JTA have abrogated this collective bargaining agreement and that the federal officials have failed to exercise statutory duties to prevent this allegedly wrongful action. We first turn to the latter contention.

SECRETARY OF LABOR

Jurisdiction in this Court depends upon plaintiff establishing that a federal question exists, and that this is 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).
settled in state courts or before the NLRB. Plaintiff cites Section 13(c) of UMTA, 49 U.S.C. § 1609(c)[2] and argues

[1] See n. 5, *infra*.

[2] "(c) It shall be a condition of any assistance under section 3 of this Act that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retaining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less

that the Secretary of Labor has continuing authority and responsibility to protect the interests of employees under the "fair and equitable" labor agreement required by this provision. It is conceded that the Secretary of Labor is not a *party* to the agreement which plaintiff claims has been breached more than ten years after it was originally executed. Plaintiff cites no authority for its position, but submits an affidavit of the general counsel of the Amalgamaged Transit Union, AFL-CIO, in Washington, to the effect that he has submitted complaints to the Department of Labor and that it has "consistently exercised ongoing responsibility to secure compliance with the requirements" of section 13c. The general counsel further asserts that the Secretary of Labor has interpreted requirements of this section of the law, made investigations of complaints of violations, engaged in conciliation, and initiated remedial action "including the administrative termination of grant funds."

That the Secretary of Labor may have performed these acts does not indicate that plaintiff has standing under the law to maintain this action against the Secretary for the particular relief requested. The Act in question provides for grants of financial assistance by the Federal government to State and local entities to assist in developing and improving mass transit. The process of collective bargaining is recognized in that the labor organization representing employees involved and the employing entity must submit an agreement covering those employees prior to approval by the Secretary of Labor. No further action on the part of the Secretary of Labor is specified. There is no jurisdictional basis for this Court to require of the Secretary of Labor a continuing responsibility not mandated or referred to in the Act in question. Compare *Kendler v. Wirtz*, 388 F.2d 381 (3d Cir. 1968) and *Johnson v. Redevelopmental Agency*, 317 F.2d 872 (9th Cir. 1963). Plaintiff has no standing in this Court to seek the relief

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than those established pursuant to section 5(2)(f) of the Act of February 4, 1887 (24 Stat. 379), as amended. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements." 49 U.S.C. § 1609(c).

requested against the Secretary of Labor. The claim against the Secretary of Labor is no basis for the exercise of pendent jurisdiction with respect to the breach of contract dispute. *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

The Secretary of Labor's motion to dismiss is therefore granted.

SECRETARY OF TRANSPORTATION

Plaintiff also alleges that the Secretary of Transportation has the responsibility, pursuant to 49 U.S.C. § 1608(e), to enforce the contractual agreement and asks that the Court order Secretary Adams (formerly Coleman) to take "appropriate action to enforce compliance." Again, there is no express statutory language upon which this petition is based except that the Secretary of the Department of Transportation is generally authorized to carry out the essential functions of the UMTA. Plaintiff argues that the Secretary is authorized under § 1602 to make grants or loans on terms and conditions required under the Act and that this authority includes the responsibility to enforce a labor contract made at the time of the Act. Section 1608(e) makes it clear that the Secretary is not to regulate the mode of operation or rates of any public or private transit agency, but plaintiff refers specifically to the following language of that section: ". . . but nothing in this subsection shall prevent the Secretary from taking such actions as may be necessary to require compliance by the agency or agencies involved with any undertaking furnished by such agency or agencies in connection with the application for the grant."

The primary purpose for the insertion of that provision, however, related to the fear of Congress that the Department of Transportation would become a super rate-maker for local and state utilities. 110 *Cong. Rec.* 14976-79 (1964). It is difficult to attribute to Congress, however, an intent to require the Secretary of Transportation, in perpetuity, to oversee, supervise and enforce the detailed

provisions of the manifold and varying contract arrangements which are "preconditions" to securing grants under UMTA. The cases cited by plaintiff[3] involved reviewability by the courts of an administrative determination required to be made by an administrative officer under a statute (1) with regard to use of federal highway funds; (2) with regard to food and drug regulations issued under congressional enactment; and (3) with regard to an Immigration Act order of exclusion by the Attorney General. These cases, in differing circumstances, spell out the right of judicial review of administrative actions *authorized and required by law*. None involves the type of mandamus sought here by plaintiff to order the Secretary of Transportation affirmatively to take some action, particularly to inject himself into the midst of a labor dispute.

Congress has been jealous to vest particular agencies, such as the Department of Labor, the National Railway Adjustment Board, the National Mediation Board and the NLRB, and not the courts, with authority to order parties to do or refrain from doing things in collective bargaining disputes. It would be stretching beyond the reasonable to infer some intent by Congress to involve the Transportation Secretary with the detailed contentions of parties about compliance with or breach of a collective bargaining agreement merely because such an agreement was made years ago in respect of an original urban transit grant approved and administered by the Transportation Department. The statute here does not create a federal right in favor of plaintiff to demand such action by the Secretary of Transportation. It does not indicate a legislative intent to create such a remedy, nor is it consistent with the legislative scheme to imply the remedy sought by plaintiff. *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). No case is cited by plaintiff indicating such an interpretation of UMTA.

[3] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 409, 412, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), and *Brownell v. WeShung*, 352 U.S. 180, 185, 77 S.Ct. 252, 1 L.Ed.2d 225 (1956).

The Court is therefore without jurisdiction to order defendant Adams, Secretary of Transportation, to take action to enforce compliance under UMTA of the contract in question. This defendant's motion to dismiss is granted.

JACKSON TRANSIT AUTHORITY AND CITY OF JACKSON

Plaintiff contends that federal question jurisdiction under 28 U.S.C. §§ 1331 and 1337 still applies because breach of the contract which was required under UMTA must be treated as a breach of the statute itself, and that plaintiff, aggrieved by reason of defendant's alleged violation, has standing to sue in federal court. Plaintiff first relies upon *Bradford School Bus Transit v. Chicago Transit Authority*, 537 F.2d 943 (7th Cir. 1976). That case, citing *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), held that a private competitor had standing to challenge an administrative determination of a UMTA grant to an allegedly competing public authority, because "the grant contract included a provision which under certain conditions specifically prohibited the CTA (public authority) from engaging in school bus operations in competition with private bus operators." 537 F.2d at 944. This was in accord with regulations issued under UMTA. Compare *Suburban Safeway Lines v. City of Chicago*, 416 F.2d 535 (7th Cir. 1969). Defendant Urban Mass Transit Administration conceded in the *Bradford* case that the purpose of the provision of the Act in question was to protect private companies "from competition by federally funded public transit systems." 537 F.2d at 946. It was, therefore, held that on the basis of competitive considerations plaintiff had standing to sue both the Urban Mass Transportation Administrator in connection with her grant decision, as well as the public transit authority directly involved in the grant. It is doubtful that this case represents authority for plaintiff here to sue the City and JTA. Nor does a later case cited by plaintiff from that Circuit, *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977), support jurisdiction in this

situation, because that case was decided under the Rehabilitation Act of 1973, 29 U.S.C. § 794.

The next case relied upon by plaintiff for standing is *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968). That case simply held that a constitutional claim involving racial discrimination was justiciable and gave plaintiff standing to challenge the action of a government agency in respect to urban renewal. Compare *Nashville I-40 Comm. v. Ellington*, 387 F.2d 179 (6th Cir. 1967), *cert. den.*, 390 U.S. 921, 88 S.Ct. 857, 19 L.Ed.2d 982 (1968). Neither *Bradford* nor *Norwalk CORE*, then, can fairly be interpreted as authorizing breach of contract claims by a private party against a local government entity because a federal statute was obliquely involved. Rather, they hold that one may utilize a good faith constitutional ground to assert discrimination in the operation or administration of a federal law or grant, and that a private party may sue the Urban Mass Transit Administrator under certain circumstances to review an administrative decision after exhaustion of administrative remedies. Other cases cited by plaintiff relate to standing by one economically and environmentally aggrieved to seek judicial review of an administrative determination.[4] There is no administrative action or determination in this case to be reviewed.

In the absence of reported decisions on point, the parties have cited several as yet unreported district court cases addressing the issue of federal subject matter jurisdiction under UMTA for breach of § 13(c) agreements. Plaintiff relies on *Local Division 519, Amalgamated Transit Union v. The LaCrosse Municipal Transit Utility, et al.*, 445 F. Supp. 798 (W.D. Wis. 1978), in which Judge Doyle found federal jurisdiction to exist under UMTA.[5]

[4] *Association of Data Processing Service Organizations, Inc. v. Camp, supra; Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970); *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973).

[5] In an earlier opinion in this case, this Court considered a transcript of Judge Doyle's bench ruling of October 25, 1977, at

Like Judge Doyle, this Court agrees that UMTA is not a regulatory statute — it rather represents an exercise of the federal spending power to deal with urban mass transit problems. It is not an act, like the Railway Labor Act, purporting to set out federal authority over employees in an industry, or the Interstate Commerce Commission Act delegating rulemaking authority over interstate transportation. UMTA deals primarily with state and municipal authorities whose concern is with local transportation problems. This Court, therefore, respectfully disagrees with the conclusion of the learned Wisconsin District Judge that Railway Labor Act[6] or Interstate Commerce Commission[7] cases are analogous to the instant situation. This Court finds no "involved implication of a private remedy" to a labor organization arising out of alleged circumstances which have occurred more than ten years after the rights of plaintiff were recognized and protected as required by UMTA at the time a grant of money was approved.

Again, like Judge Doyle, this Court concludes that while *Bradford School Bus Transit v. Chicago Transit,* 537 F.2d 943 (7th Cir. 1976) and *Lloyd v. Regional Transportation Authority,* 548 F.2d 1277 (7th Cir. 1977) might or could be supportive of plaintiff's position, they are *not directly so.* UMTA was intended to protect collective bargaining rights only secondarily. Congress addressed this issue to assure employees that existing rights and contracts would not be eliminated as a part of the initial grant process to municipalities and that the grants under the Act would "not be used in a manner that is directly or indirectly detrimental to legitimate interests and rights of such workers." 2 *U.S. Code Congressional and Adminis-*

which time he reserved ruling on the jurisdictional issue. The Court has fully considered Judge Doyle's opinion of January 27, 1978, in addressing plaintiff's motion to reconsider.

[6] *International Association of Machinists v. Central Airlines,* 372 U.S. 682, 83 S.Ct. 956, 10 L.Ed.2d 67 (1963).

[7] *Brotherhood of Locomotive Engineers v. Chicago & Northwestern Railway Company,* 314 F.2d 424 (8th Cir. 1963).

trative News p. 2584 (1964). The federal officials charged with this responsibility have acted properly here by not involving themselves in continuous controversies between private (or public) parties to a contract approved by them.

This Court is persuaded that Congress is the appro- appropriate body to determine clearly whether it is national policy for federal courts to become involved in local labor disputes which happen to be within an urban transit area. Congress has not indicated such a policy in UMTA. Moreove., plaintiff asserts no claim of constitutional concern such as race or sex discrimination or freedom of speech. Compare *Cannon v. University of Chicago,* 559 F.2d 1063 (7th Cir. 1977).

Further, it appears that all other courts which have addressed this issue have concluded, contrary to Judge Doyle, that no federal subject matter jurisdiction exists for breach of contract actions under UMTA.[8] These decisions emphasize that the union's right of action draws its vitality from the collective bargaining agreement, enforceable under state law, rather than from the provisions of UMTA.

Moreover, this Court is convinced that plaintiff's right of collective bargaining will not be lost if this matter is left to state law on the basis of a breach of contract or arbitration claim. It should be noted on the record before us that the private employer with which plaintiff had dealt prior to 1966 had already served notice of its intent to terminate business as of April 2, 1976, before the City's creation of JTA under *Tennessee Code Annotated* § 6-1602 and the application for federal funds under UMTA for new

[8] *Local Division No. 714, Amalgamated Transit Union v. Greater Portland Transit District,* Civ. No. 77-54-SD (D. Me. Jan. 11, 1978); *Division 580, Amalgamated Transit Union v. Central New York Regional Transportation Authority,* No. 77-CV-45 (N.D. N.Y. Oct. 19, 1977); *Transit Authority of Louisville and Jefferson County v. Amalgamated Transit Union,* No. C-76-0535-L(B) (W.D. Ky. April 20, 1977); *Metropolitan Atlanta Rapid Transit Authority v. Local Division 732, Amalgamated Transit Union,* Civ. No. 18492 (N.D. Ga. July 11, 1973).

buses and a new garage structure.[9] Plaintiff would have, absent such action, no contract with any viable entity because, as the ordinance states, there did "not appear to be any private source interested in establishing and operating bus service within the City of Jackson." The contract which is sought to be enforced sets out private rights which may be enforced, if necessary, in state court. The rights of plaintiff were preserved in the contract which was approved by federal authorities as a part of a grant application procedure. This Court is not inclined to find that federal law has pre-empted state remedies as claimed by plaintiff. *Tennessee Code Annotated* § 6-3802 (1976 Supp.), specifically authorizes Tennessee cities and transit authorities, such as those involved here, to enter into contracts to protect workers as provided in UMTA, and further provides for binding arbitration pursuant to the provisions of any collective bargaining agreement.[10]

The Court also has carefully considered the implications of *McDaniel v. University of Chicago,* 512 F.2d 583 (7th Cir. 1975), *vacated and remanded,* 423 U.S. 810, 96 S. Ct. 20, 46 L. Ed. 2d 30 (1975), *on remand,* 548 F.2d 689 (7th Cir. 1975), *vacated and remanded,* 423 U.S. 810, 96 S.Ct. 20, 46 L.Ed.2d 30 (1975), *on remand,* 548 F.2d 689 (7th Cir. 1977), *cert. den.,* 431 U.S. 963, 98 S.Ct. 765, 54 L.Ed. Ct. 2080, 45 L.ED.2d 26 (1975), that there was any demonstrated legislative intent to create a private federal remedy for labor organizations such as plaintiff. This is a cause of action traditionally relegated to state law, unless preempted by a federal statute or agency, such as NLRA or NLRB. As stated above, the Court is not persuaded that federal law preempts whatever remedies plaintiff has under state law.

In summary, plaintiff seeks to enforce, or an interpretation of, asserted contractual rights in this cause. The suit

[9] See Jackson City Ordinance proposed April 1, 1966, approved April 5, 1966.

[10] Section 6 of the agreement in controversy provides for arbitration which plaintiff seeks.

is not basically concerned with the validity or construction of a federal statute or the action taken by an administrative officer or agency under provisions of the federal statute. "The fact that a contract is subject to federal regulation does not, in itself, demonstrate that Congress meant all aspects of its performance or nonperformance to be governed by federal law rather than by the state law applicable to similar contracts in businesses not under federal regulation[s]." *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 490 (2d Cir. 1968). See also *McFaddin Express v. Adley Corp.*, 346 F.2d 424 (2d Cir. 1965).

As was previously stated, plaintiff does not present a federal question in its asserted claim against the Secretaries of Labor and Transportation. As such, there is no basis for assuming pendent jurisdiction over what has been determined to be a state-law breach of contract or arbitration claim.

Plaintiff has therefore failed to demonstrate that federal jurisdiction exists in this case. Defendants' motions to dismiss are accordingly granted.

JUDGMENT

(Filed June 3, 1981)

APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded for further proceedings consistent with the opinion.

It is further ordered that Plaintiff-Appellant recover from Defendants-Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN,
Clerk.

A True Copy

Attest:

AUDREY CROCKETT,
Deputy Clerk

Supplemental Brief

FILED
NOV 25 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE,

Petitioners,

v.

LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
ADDITIONAL REASON FOR GRANTING THE WRIT:	
The Circuit Courts of Appeal have rendered conflicting decisions concerning the meaning and application of the Urban Mass Transportation Act of 1964	2
CONCLUSION	9
APPENDIX	1a-55a

TABLE OF AUTHORITIES

Cases

Bradford School Bus Transit, Inc. v. Chicago Transit Authority, 537 F.2d 943 (7th Cir. 1976)	7
Lloyd v. Regional Transportation Authority, 548 F.2d (7th Cir. 1977)	7
Local Div. 589, etc. v. Commonwealth of Massachusetts, Nos. 81-1180, 1198, and 1219 (1st Cir., September 30, 1981), modifying 511 F. Supp. 312 (D. Mass. 1981)	*passim*
Local Division 589, Amalgamated Transit Union v. Amalgamated Transit Union, 295 F. Supp. 630 (D. Mass. 1969)	5
Local Div. 714 v. Greater Portland Transit District, etc., 589 F.2d 1 (1st Cir. 1978)	8, 9
Local Div. 1285, etc. v. Jackson Transit Authority, 650 F.2d 1379 (1981)	5, 8
National League of Cities v. Usery, 426 U.S. 833 (1976)	5
Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979)	7
Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980)	7

PAGE

Statutes

Section 13(c) Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609(c) ..... *passim*

Other Authorities

Supreme Court rules, Rule 22.6 1

No. 81-411

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OCTOBER TERM, 1981

JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE,

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Jackson Transit Authority and the City of Jackson, Tennessee, Petitioners, pursuant to Rule 22.6 of the Supreme Court Rules, hereby supplement their Petition for a Writ of Certiorari in this matter, to call attention to a new decision, not available at the time their original Petition was filed.

ARGUMENT

THE CIRCUIT COURTS OF APPEAL HAVE RENDERED CONFLICTING DECISIONS CONCERNING THE MEANING AND APPLICATION OF THE URBAN MASS TRANSPORTATION ACT OF 1964.

On September 30, 1981, after the original petition in this matter was filed, the United States Court of Appeals for the First Circuit issued its decision in *Local Div. 589, etc. v. Commonwealth of Massachusetts*, Nos. 81-1180, 1198, and 1219 (1st Cir., September 30, 1981), *modifying* 511 F. Supp. 312 (D. Mass. 1981). At issue in *Local 589* was the ability of the Massachusetts legislature to enact municipal transit labor statutes whose terms are inconsistent with the provisions of a pre-existing agreement, concluded by the Massachusetts Bay Transit Authority (MBTA) under Section 13(c) of the Urban Mass Transportation Act of 1964 (UMTA), 49 U.S.C. § 1609(c), in order to obtain federal grants. Deciding that Congress did not intend to preempt state law by enacting UMTA, the First Circuit declared the Massachusetts statutes valid.

In 1973, the MBTA entered into a detailed collective bargaining agreement with Local Division 589 of the Amalgamated Transit Union, the union which represents MBTA employees. The agreement provided specific arbitration procedures to resolve disputes between the parties about changes to the agreement before its automatic renewal at the conclusion of successive two year terms. On December 10, 1974, the MBTA concluded a labor protection agreement, under UMTA Section 13(c), to obtain federal financial assistance. As part of the "fair and equitable arrangements" which it contained, the Section 13(c) Agreement provided for the preservation and continuation of collective bargaining rights "including the right to arbitrate labor disputes . . . to the extent such are provided for by applicable laws and for existing collective

bargaining agreements, or otherwise . . ." *Id.*, Supplemental Apx. at 13a.[1]

Following one renewal of the collective bargaining agreement, altered under its interest arbitration procedures, the parties reached an impasse concerning a second renewal. No arbitration of the impasse occurred. Instead, in July 1978 the Massachusetts legislature enacted a statute, designed to contain rising transit costs, which mandated interest arbitration procedures different from those contained in the collective bargaining agreement; which established specific factors upon which the arbitrator of any collective bargaining dispute was mandated to rely in determining the basis for an arbitration award; and which disallowed any provision for cost of living adjustments after the expiration of the contract period (7a-10a).

The union insisted on arbitration under the terms of the agreement; the MBTA considered itself bound to comply with the new state law. The impasse was resolved when the parties executed a memorandum of understanding, amending the collective bargaining agreement and extending its term until the end of 1980. The memorandum was executed by MBTA with the proviso that it was "Approved as to form to the extent not inconsistent with [the new state law]." (6a).

At the end of 1980 the parties again began negotiations about changes in the collective bargaining agreement. Concerned about continually rising labor costs, the Massachusetts legislature enacted a second statute which imposed further conditions on settlement of municipal transit labor disputes. Most importantly, the 1980 statute prohibited the MBTA from bargaining collectively or submitting to arbitration disputes about "inherent man-

[1] Hereinafter all references to the Supplemental Appendix, which contains only the *Local 589* decision, will be made only to the relevant pages.

agement rights"; from agreeing to pay any pensions based upon overtime pay; and from submitting to arbitration or agreeing to any contract provision providing for automatic cost of living adjustments (9a-10a).

The MBTA refused to arbitrate except in conformity with state law; the union sought arbitration under the collective bargaining agreement. To resolve the impasse about arbitration procedures, the union commenced action in the District of Massachusetts, seeking a declaration that the two Massachusetts statutes violated the Section 13(c) Agreement, whose terms, the union claimed, were constitutionally paramount by virtue of UMTA and the Supremacy Clause (11a-12a).

Recognizing the conflict which existed between the state statutes and the agreements between the union and the MBTA, and noting the power of Congress to enact legislation "forbidding states that accept federal money from passing laws inconsistent with a federal statute . . . or . . . with assurances made pursuant to the statute . . .", the First Circuit addressed the question "whether Congress intended assurances made pursuant to § 13(c) [of UMTA], to override conflicting state law." (18a-19a). Following an extensive examination of the legislative history of the statute, the court found "no evidence of any intent that a § 13(c) assurance supersedes state law; rather, that history reveals the contrary." (20a).

If, as the union contended in *Local 589* and in this case, § 13(c) assurances override contrary state law or municipal policy, then "Congress, in enacting § 13(c), to a significant extent federalized collective bargaining with local transit unions" and transferred "predominate legal authority for local transit labor relations from state to federal government." (31a). Under precisely such a misinterpretation of the legislative history of § 13(c), the Court of Appeals for the Sixth Circuit in this case found it "undisputable [sic]

that Section 13(c) reflects *national* labor policy." *Local Div. 1285, etc. v. Jackson Transit Authority,* 650 F.2d 1379, 1385-86 (1981) (emphasis added). Disagreeing with that incorrect conclusion, in *Local 589* the First Circuit "determined not to follow [the Jackson decision]" (37a), and held that Congress did *not* intend to create a federal transit labor law:

> Whether or not such a federal presence is desirable, we cannot interpret the ambiguous language of § 13(c) to create it without a fairly clear indication that such was Congress's intent. Unlike railway and airline workers, we are here considering workers for local transit companies whose employers, by and large, are municipalities or state governments. *Cf. National League of Cities v. Usery, supra.* Moreover, in the National Labor Relations Act Congress explicitly exempted public employees, such as MBTA workers, from federal labor legislation. *See Local Division 589, Amalgamated Transit Union v. Amalgamated Transit Union,* 295 F. Supp. 630, 632 (D. Mass. 1969). Had Congress intended to grant the Secretary of Labor NLRB-type (or more) power to override state law governing these local public employees, one would expect to find some indication that Congress at least thought about the matter. But instead, the legislative history is silent. Not a word indicates that Congress intended such a result. The unions in 1963 urged no such outcome.
>
> To the contrary, the legislative history suggests that Congress was sensitive to the local nature of local transit; it "expected that specific conditions [in § 13(c) assurances] normally will be the product of local bargaining and negotiations;" Senate Report, *supra* note 25, at 28; *see* House Report, *supra* note 25, [1964] U.S. Code Cong. & Admin. News at 2584-2585, and its members made the many statements previously discussed suggesting the legal supremacy of state law.
>
> (*Local Div. 589, etc. v. Massachusetts,* 31a-32a (notes omitted)).

So holding, the First Circuit declared the revised Massachusetts transit labor statutes constitutionally valid, and placed itself squarely in conflict with the Sixth Circuit's construction of UMTA. It was precisely the Sixth Circuit's wrong construction of UMTA Section 13(c), the petitioner contends, which led that Court erroneously to conclude that Section 13(c) impliedly created a private federal remedy for alleged breaches of Section 13(c) agreements, and to assume jurisdiction of actions purportedly "arising under" the terms of that statute.

As the First Circuit correctly held, "the federal statutory scheme [enacted in UMTA] may provide other remedies for violation of an assurance." (19a). Such assurances, the court continued, "need not override state law to make § 13(c) enforceable." Indeed, the First Circuit noted:

> "The threat of receiving no further UMTA funds would often prevent a state currently receiving those funds from changing its laws contrary to the policy of § 13(c). If not, the Secretary might halt the flow of funds or take other appropriate action. In any event, such an enforcement scheme is more consistent with Congressional intent than the alternative urged upon us by the Transit Union; namely, that § 13(c) permanently binds states to the details of § 13(c) assurances and referenced collective bargaining agreements entered into perhaps a decade earlier, regardless of whether changes in state law are, in any overall sense, unfair. Even if such a system is desirable, the legislative history of UMTA suggests that Congress did not intend to create it.
>
> (*Local Div. 589, etc. v. Massachusetts, 33a-34a*).

By way of contrast, the Sixth Circuit Court of Appeals found no administrative remedy expressly or impliedly created by UMTA Section 13(c), available to enforce compliance with existing Section 13(c) assurances. Although the Sixth Circuit was willing to reach the incongruous conclusion that Congressional silence permit-

ted the inference of a private federal cause of action, it was willing to construe that same silence to preclude administrative relief, and, indeed, administrative discretion in continuing federal assistance:

> The Act offers no administrative solution to the problem of enforcing Section 13(c) agreements. By contrast, the implementation of certain other provisions of the statute is specifically delegated to the Department of Transportation. Unless we impute to the Secretary of Transportation the responsibility for handling labor relations disputes — an incongruous result which we decline to reach without a clear Congressional directive — we are left, if only by default, with an implied private cause of action. *See Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977). We do note, however, that if the Act had provided any administrative mechanism under Section 13(c), our resolution of this issue might have been altogether different. *Transamerica Mortgage Advisors, Inc. v. Lewis, supra; Taylor v. Brighton Corp., supra; Bradford School Bus Transit, Inc. v. Chicago Transit Authority*, 537 F.2d 943 (7th Cir. 1976).
>
> * * * * * *
>
> With respect to Section 13(c), however, we are unable to conclude that Congress has imposed mandatory enforcement duties on the Secretary of Transportation. In the first place, the only administrative official even mentioned in that section is the Secretary of Labor, whose limited role we have already discussed. It would be unreasonable to assume that Congress intended to require the Department of Transportation to resolve labor relations disputes, yet neglected to say so despite its explicit mandate under other sections of the statute. Furthermore, we have discovered nothing in the legislative history to indicate that Congress contemplated the result the Union seeks here. This statute was enacted eighteen years ago, yet nothing in the record before us suggests that the Secretary of Transportation has ever assumed responsibility for enforcing the terms of labor protec-

tive agreements. This factor alone is scarcely dispositive of the issue. However, it is not unlikely that Congress would have amended Section 13(c) had it perceived a need for active enforcement by the Department of Transportation. Indeed, Congress did respond to just such a need when it added Section 3(f), discussed above, to the Act in 1974.

We are aware that the First Circuit has indicated a belief that the Secretary of Transportation has at least discretionary authority to enforce labor protective arrangements by virtue of Section 12(e) of the Act. [49 U.S.C. 1608(e)]. *Local Division 714 v. Greater Portland Transit District, supra.* It stopped short of deciding that transit employees can compel the Department of Transportation to take action, although it characterized that possibility as "plausible." 589 F.2d at 14. It is impossible to determine from *Greater Portland* whether our decision here actually conflicts with the law in the First Circuit, since that court's analysis was purely hypothetical. The Secretary of Transportation was not a party to that case, and the question of administrative enforcement of Section 13(c) was not at issue. Instead, the First Circuit offered its interpretation of the Secretary's statutory role as one of several arguments in favor of inferring a private federal cause of action on behalf of the plaintiff union.

> (*Jackson Transit Authority, et al. v. Local Div. 1285, etc.*, 650 F.2d 1379, 13 (6th Cir. 1981), Petition Appendix at 10a-11a, 16a-17a).[2]

Under the Sixth Circuit's rationale, therefore, the supposed absence of an administrative remedy under UMTA justified its inference of a private federal cause of action.

[2] Similarly incongruous was the Sixth Circuit's apparent willingness to conclude, from the failure of Congress in 1974 to amend UMTA to provide any explicit administrative remedy, that no such remedy exists, and its conclusion that, notwithstanding the Congress' similar refusal to enact any judicial remedy, a private federal cause of action may be inferred from the terms of Section 13(c).

That court found ambiguity in the First Circuit's decision in *Local Div. 714 v. Greater Portland Transit District, etc.*, 589 F.2d 1 (1st Cir. 1978), concerning the presence or absence of such an administrative remedy. However, such ambiguity was clearly resolved in *Local 589*, which found precisely such administrative relief to have been provided by UMTA. The decision in *Local 589*, therefore, places the First and Sixth Circuits in diametric conflict on the question of administrative relief, a question important to the inference by the Sixth Circuit of a private federal cause of action under UMTA Section 13(c).

In sum, conflict now exists among the Circuits concerning the meaning and proper application of Section 13(c) of UMTA. The existence of such conflict undermines the holdings of each court, including the Sixth Circuit in this case, which has assumed jurisdiction of actions purportedly "arising under" Section 13(c), and which has found an implied federal cause of action present in the statute. Such conflict, the petitioner submits, strongly supports the issuance of a Writ of Certiorari in this case, to resolve the differences which exist among the Circuits.

CONCLUSION

For the foregoing reasons, and for the reasons advanced in the original petition filed in this matter, the Petitioners respectfully request that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit in this case.

Respectfully submitted,

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Appendix

SUPPLEMENTAL APPENDIX

United States Court of Appeals
for the First Circuit

No. 81-1180

Local Division 589,
Amalgamated Transit Union, AFL-CIO, CLC,
Plaintiff, Appellant,
v.
The Commonwealth of Massachusetts, et al.,
Defendants, Appellees.

No. 81-1198

Local Division 589,
Amalgamated Transit Union, AFL-CIO, et al.,
Plaintiffs, Appellees,
v.
The Commonwealth of Massachusetts, et al.,
Defendants, Appellants.

No. 81-1219

Local Division 589,
Amalgamated Transit Union, AFL-CIO,
Plaintiff, Appellee,
v.
The Commonwealth of Massachusetts,
Defendant, Appellee,

Massachusetts Bay Transportation Authority,

Defendant, Appellant.

Appeal from the United States District Court
for the District of Massachusetts

[Hon. Walter Jay Skinner, U.S. District Judge]
[511 F. Supp. 312 (D. Mass. 1981)]

Before Campbell, Bownes and Breyer, Circuit Judges.

Linda R. Hirshman, with whom Jacobs, Burns, Sugarman & Orlove, Earle Putnam, General Counsel, Douglas Taylor, and Gromfine, Sternstein, Rosen and Taylor, P.C. were on brief, for Local Division 589, Amalgamated Transit Union.

Dwight Golann, Assistant Attorney General, with whom Francis X. Bellotti, Attorney General, Mitchell S. Sikora, Jr., Bruce Mohl, Stephen M. Limon, Assistant Attorneys General, and Max Beck were on brief, for The Commonwealth of Massachusetts, et al.

Joseph Elcock, General Counsel, with whom Ronald G. Busconi, Assistant General Counsel, was on brief for the Massachusetts Bay Transportation Authority.

William J. Riley, and Flamm, Kaplan, Paven & Feinberg on brief for the Boston Lodge 264, District 38, International Association of Machinists and Aerospace Workers.

September 30, 1981

BREYER, *Circuit Judge*. This case raises two difficult and important sets of questions concerning collective bargaining and rapid transit. First, can the Commonwealth of Massachusetts enact statutes that are inconsistent with assurances that its Transit Authority previously gave the Secretary of Labor as part of an application for federal grant money? Second, do those Massachusetts statutes unconstitutionally impair pre-existing collective bargaining contracts? We find that insofar as federal law is concerned, the state statutes are valid.

I

A

Since 1912 appellant, Local 589 of the Amalgamated Transit Union (the "Transit Union") has represented most Boston transit system employees. Before 1947, it negotiated contracts with the system's private owners (Boston Elevated Railway). Since 1947, it has negotiated with the system's public owner, which is now the Massachusetts Bay Transportation Authority (MBTA).[1] The MBTA is a public agency with power to enter into binding agreements on behalf of the Commonwealth.[2]

[1] In 1947, Boston Elevated Railway was purchased by a public entity, the Metropolitan Transportation Authority (MTA). As a result of the takeover, MTA workers became public employees; Section 19 of the enabling act, Chapter 544 of the Acts of 1947, authorized the MTA to bargain collectively and to submit contract disputes to binding interest arbitration.

[2] In 1964, Congress enacted the Urban Mass Transportation Act, 49 U.S.C. §§ 1601-1613. Under that statute, federal money flows only to state and local public bodies and agencies, 49 U.S.C. § 1602(a)(1). In order to take advantage of the available federal funds, the Massachusetts legislature converted the MTA to the MBTA in 1964. Mass. Gen. Laws Ann. ch. 161A. Pursuant to state law, "[t]he authority is authorized and directed from time to time to take all necessary action to secure any federal assistance which is or may become available . . . for any of the purposes of this chapter. . . ." Mass. Gen. Laws Ann. ch. 161A, § 29 (cum. supp. 1981). The MBTA is also authorized "to bargain collectively with labor organizations representing employees of the authority and to enter into agreements . . . with such

On January 1, 1973, the Transit Union and the MBTA entered into a detailed agreement setting forth wages, hours and working conditions. We shall refer to that agreement as the Basic Agreement. Its most important provisions for present purposes are those governing the procedure for changing its terms.

As read literally, the Basic Agreement provides that its terms will remain in effect forever unless (1) *both* parties agree to a change *or* (2) an arbitration panel changes the Agreement's terms. The Agreement invokes a type of arbitration called "interest arbitration". Unlike "grievance arbitration," which involves the interpretation and application of existing contractual provisions, "interest arbitration" involves the creation of new substantive contractual terms, which will govern the parties' future relations.[3] To be more specific, the 1973 Basic Agreement provides:

> a) The Basic Agreement and its provisions shall continue in force until December 31, 1975 "and from year to year thereafter unless changed by the Parties" after appropriate notice. (§ 600)
>
> b) After appropriate notice the contract will "be opened up and the change or changes desired shall then be considered. . . ." "Upon failure to reach a mutual agreement upon any of the changes desired . . . the same shall be arbitrated as provided for in this Agreement and the Award shall then be entered into and become a part of this Agreement." (§ 601)
>
> c) Arbitration is to be conducted by a "Board of Arbitration selected in a manner provided in Section 103." (§ 100)
>
> d) The Board of Arbitration shall consist of three members, one selected by the Transit Union, one by the MBTA, and the third chosen from a list of five

organizations. . . ." Mass. Gen. Laws Ann. ch. 161A, § 19 (cum. supp. 1981).

[3] For a discussion of interest arbitration, see F. Elkouri & E. Elkouri, How Arbitration Works, 47-48, 50-57 (3rd ed. 1973).

provided by the American Arbitration Association (through a process of successive striking) of "persons experienced in transportation." (§ 103).

As provided in these sections, the Basic Agreement was "opened up" at the end of 1975. The parties could not agree about the changes they had separately proposed, and they proceeded to arbitration. In 1976, the arbitration panel entered an award changing the Basic Agreement in various ways. But the arbitrators did not change the Agreement's procedure for making changes. And, they stated that "all provisions of the Agreement which are not modified by this Award shall continue in effect." They ruled that the Basic Agreement, as modified, would extend through December 31, 1977.

At the beginning of 1978, the Basic Agreement was again "opened up". Again the parties could not agree about the changes they had separately proposed. This time, however, they did not proceed to arbitration. In May, the Transit Union sought arbitration — and the MBTA began to prepare for arbitration. But in July, the Massachusetts legislature enacted a statute, Chapter 405 of the General Laws. This statute, designed to hold down rapidly rising transit costs, mandated an arbitration procedure somewhat different from that contained in the Basic Agreement. The Transit Union immediately claimed that Chapter 405 was itself inconsistent with the Basic Agreement; and it insisted upon Basic Agreement-type arbitration. The MBTA believed that Chapter 405 was lawful, and it insisted upon Chapter 405-type arbitration.

The impasse was resolved on August 8, 1979 when the parties entered into a "Memorandum of Understanding". The Memorandum began by stating "that the Articles of Agreement entered into as of January 1, 1973, as amended, shall be further amended as follows." The Memorandum went on to make a host of changes in the Basic Agreement, but it did not change the "interest

arbitration" provisions in any relevant respect.[4] The Memorandum extended the Basic Agreement as modified by stating "The express term of the Articles of Agreement shall be January 1, 1978, to and including December 31, 1980". In signing the Memorandum, however, the MBTA wrote, "Approved as to form to the extent not inconsistent with Chapter 405 of the Acts of 1978."

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[4] The Memorandum did change sections 600 and 601 (Basic Agreement provisions governing the procedure for changing the Basic Agreement). These changes, however, dealt only with the *notification* provisions, not the *arbitration* provisions. The Memorandum provides in relevant part:

> 4. *Changes in Agreement*
> Sections 600 and 601 shall be amended to read as follows: This Agreement and the provisions hereof shall continue in force and be binding upon the respective parties hereto until and including the thirty-first day of December, 1980, and from year to year thereafter unless changed by the parties. Either of the parties desiring a change in any section or sections of this Agreement shall notify the other party, in writing, that it desires a change at least one hundred and eighty (180) days prior to the thirty-first day of December, 1980, and thereafter, at least one hundred and eighty (180) days prior to the end of each year, which is the thirty-first day of December. Such notification shall include, in writing, all the specific changes desired of either party.
> Within ten (10) days of the receipt of notification of desired changes, representatives of the parties shall commence negotiations in an effort to reach a mutual agreement upon the changes desired by the parties.
> Upon failure to reach an agreement on all the changes desired by the parties ninety (90) days prior to the expiration of the Agreement, the parties shall submit the disputed issues to final and binding arbitration as provided for in this Agreement, and they shall forthwith take such steps as will assure that the arbitrator will be selected within sixty (60) days prior to the expiration of the Agreement. Nothing herein shall preclude the parties from continuing to negotiate in an effort to resolve their differences during the period, while the procedures for the establishment of arbitration are in process.

At the end of 1980, the Basic Agreement[5] was once again opened up and the parties sought changes. At this point, the legislature, concerned about a possible transit shutdown due to lack of funds, enacted another statute, Chapter 581 of the General Laws. That statute also sought to hold down costs by imposing additional conditions upon the arbitration (and collective bargaining) procedures. The parties immediately reiterated the positions they had taken in 1978. The Transit Union claimed that both Chapters 405 and 581 were illegal and that arbitration must take place in accordance with the Basic Agreement's specified procedure. The MBTA refused to arbitrate except in conformity with Chapters 405 and 581.

The major differences between the two sets of procedures are the following: the Basic Agreement procedure as previously mentioned, involves three arbitrators. The Transit Union and the MBTA each select one arbitrator. The third, selected by the other two, is to be a person experienced in transportation matters. The arbitration standards used, while unspecified in the Basic Agreement, are presumably those traditionally used in local transit interest arbitration.[6]

By contrast, the 1978 Chapter 405 procedure requires (1) that mediation precede arbitration,[7] (2) that a single

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[5] Henceforth, unless the context clearly calls for a different reading, references to the "Basic Agreement" should be read to mean the "Basic Agreement (as amended)".

[6] "The standards used by [interests] arbitrators are not pulled out of the air — nor are they artificially created. They are, generally speaking, the very same ones that are used by the parties in their negotiations. . . .

Without question the most extensively used standard in "interests" arbitration is prevailing practice. . . ."

F. Elkouri & E. Elkouri, *supra* note 3, at 745, 746, 747.

Both the "national comparable cities" standard and area comparisons have been used in the local transit industry. *Id.* at 751 n.20.

[7] Codified at Mass. Gen. Laws Ann. ch. 161A, § 19D (cum. supp. 1981).

arbitrator who is a resident of Massachusetts and "experienced in state and local finance", conduct the arbitration,[8] (3) that the arbitrator "rely primarily" on nine statutory factors, including "the financial ability of the authority to meet additional costs," and wages, hours and working conditions of comparable Massachusetts employees,[9] (4)

[8] Codified at Mass. Gen. Laws. Ann. ch. 161A, § 19E (cum. supp. 1981).

[9] Mass. Gen. Laws Ann. ch. 161A, § 19F (1976), provided:

> The arbitrator shall rely primarily on the following factors in determining the basis for an award:
>
> 1. The financial ability of the authority to meet additional costs, which shall include but not be limited to:
>
> a. the statutory requirement of advisory board approval of the authority's fiscal budget;
>
> b. the financial ability of the individual communities and the commonwealth to meet additional costs;
>
> c. the average per capita tax burden, average annual income and sources of revenue within the commonwealth and the effect of any arbitration award on the respective property tax rates of the cities and towns within the authority's district.
>
> 2. The overall compensation presently received by the employees, having regard not only for wages for time actually worked but also for wages for time not worked, including vacations, holidays and other excused time.
>
> 3. All benefits received by the employees, including insurance, pension, as well as the continuity and stability of employment.
>
> 4. The hazards of employment, physical, educational and mental qualifications, job training and skills involved.
>
> 5. A comparison of wages, hours, and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services within the commonwealth and with other employees generally in public and private employment within the commonwealth.
>
> 6. The average consumer price for goods and services, commonly known as the cost of living.
>
> 7. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
>
> 8. Such other factors, not confined to the foregoing, which are normally or traditionally taken into considera-

that the arbitrator issue a written opinion analyzing the application of the statutory factors,[10] (5) that the arbitrator disallow any provision for cost of living adjustments after the expiration of a contract period.[11] Chapter 581,[12] enacted at the end of 1980, forbids the MBTA to bargain collectively or agree with the Transit Union about "inherent management rights." These rights are defined to include the right to hire, promote, assign, direct and discharge employees,[13] to direct and control programs and departments, to determine staffing levels, to assign overtime, to hire part-time employees, and to decide how to procure goods and services. Chapter 581 also forbids the MBTA to agree to pay pensions that are based upon overtime pay or

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tion in the determination of wages, hours and conditions of employment through voluntary collective bargaining, medication, fact-finding, arbitration or otherwise between parties, in the public service of the commonwealth.

9. The stipulation of the parties.

Paragraph 8 was subsequently amended in 1981 by ch. 581. *See* note 14, *infra*.

[10] Codified at Mass. Gen. Laws Ann. ch. 161A, § 19G (cum. supp. 1981).

[11] Mass. Gen. Laws Ann. ch. 161A, § 19G (cum. supp. 1981) provides in relevant part:

> The scope of arbitration shall be limited to wages, hours, and conditions of employment and shall not include any provisions for any cost of living adjustments which are based on changes in the Consumer Price Index after the expiration of the contract period covered by the award. In addition, any wage or salary adjustments shall be expressed in per cent or dollar amounts, and in no case shall there be any provisions for salary adjustments to occur after the expiration of the contract period covered by the award.

[12] Codified at Mass. Gen. Laws Ann. ch. 161A, § 19 (cum. supp. 1981). *See* note 14, *infra*.

[13] The MBTA states in its brief on appeal that its employees may be discharged "for cause" and notes that § 102 of the 1973 Basic Agreement provides that "[t]he Authority will exercise the exclusive right to . . . discharge its employees for cause."

to provide for automatic cost-of-living adjustments. It removed all of these matters from arbitration.[14]

[14] As codified at Mass. Gen. Laws Ann. ch. 161A, § 19 (cum. supp. 1981), ch. 581 provides:

> The directors shall have authority to bargain collectively with labor organizations representing employees of the authority and to enter into agreements, with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of such employees; provided, however, that the directors shall have no authority to bargain collectively and shall have no authority to enter into collective bargaining agreements with respect to matters of inherent management right which shall include the right;
>
> (*i*) to direct, appoint, employ, assign and promote officers, agents and employees, and to determine the standards therefor.
>
> (*ii*) (A) to discharge and terminate employees subject to the provisions of such clauses (B) and (C).
>
> (B) No action set forth in (A) shall be sustained if, in a proceeding invoked in accordance with the provisions of such clause (C), the employee shall establish by a preponderance of the evidence that it was based upon race, color, religion, sex, age, national origin, handicapping condition, marital status, or political affiliation or activities or union activities or union organizing of the employees; a reprisal against the employee for disclosure of information by an employee which the employee reasonably believes evidences a violation of any law, rule or regulation or mismanagement, a gross waste of funds, or abuse of authority; a reprisal against any employee for the refusal of any person to engage in political activity.
>
> (C) The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration which may be invoked in the event any employee of the authority is aggrieved by any action taken under such clause (A).
>
> (*iii*) to plan and determine the levels of service provided by the authority.
>
> (*iv*) to direct, supervise, control, and evaluate the departments, units, and programs of the authority; to classify the various positions of the authority and ascribe duties and standards of productivity therefor.
>
> (*v*) to develop and determine levels of staffing and training.

B

The Transit Union bases its claim that Chapters 405 and 581 are unlawful on two separate constitutional grounds. It makes a conceptually simple "Contract Clause" argument. It claims that the Basic Agreement constitutes a contract with the Commonwealth of Massachusetts. Chapters 405 and 581, in its view, unconstitutionally

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(*vi*) to determine whether goods or services should be made, leased, contracted for, or purchased on either a temporary or permanent basis.

(*vii*) to assign and apportion overtime.

(*viii*) to hire part-time employees.

The authority is hereby prohibited from bargaining collectively or entering into any agreement to make pension benefit payments to its employees that are determined in a manner that includes the amount of overtime earnings of said employees.

The authority is hereby prohibited from bargaining collectively or entering into a contract which provides for automatic cost-of-living salary adjustments which are based on changes in the Consumer Price Index or other similar adjustments unless specifically authorized by law. Except as provided in sections nineteen C to nineteen G, inclusive, the employees of the authority shall submit all grievances and disputes pursuant to arbitration provisions in agreement existing at the time of the creation of the authority or subsequently entered into with the authority or, in the absence of such provisions, to the state board of conciliation and arbitration, or other board or body having similar powers and duties. The provisions of general or special laws relative to rates of wages, hours of employment and working conditions of public employees, shall not apply to the authority nor to the employees thereof, but the authority and its employees shall be governed with respect to hours of employment, rates of wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of its employees by the laws relating to streets, railway companies.

Chapter 581 also amended ch. 405, Mass. Gen. Laws. Ann. ch. 161A, § 19F (cum. supp. 1981), so that paragraph 8 of that section now provides that

> [t]he arbitrator shall rely . . . on . . . [s]uch other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination

impair the obligations of that contract.[15] The Union also claims that those chapters violate the Supremacy Clause of the Constitution.[16] It argues that they are inconsistent with assurances that Massachusetts gave the Secretary of Labor under the Urban Mass Transportation Act (UMTA), § 13(c), 49 U.S.C. § 1609(c), and that such assurances, given to a federal official, must prevail, as a constitutional matter, over state law to the contrary. A few additional facts about UMTA will help to clarify this argument.

UMTA provides states with federal money to buy and to improve transit equipment and to supplement the operating revenues of local mass transit systems. In 1964 when Congress enacted this law it included in § 13(c) a requirement that, as a condition of obtaining a grant, the Secretary of Labor certify that "fair and equitable arrangements" have been made "to protect the interests of employees affected" by the federal assistance. It adds that these protective arrangements "shall include such provisions as may be necessary for . . . preserving rights, privileges and benefits . . . under existing collective bargaining agreements," continuing "collective bargaining rights . . .," protecting "individual employees against a worsening of their positions with respect to their employment . . ." and so on.[17]

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of wages, hours and conditions of employment through voluntary collective bargaining mediation, factfinding, arbitration or otherwise between parties, in the public service of the commonwealth and which are not precluded from bargaining under section nineteen.

[15] U.S. Constit. art. I., § 10 provides in relevant part: "no state shall . . . pass any . . . law impairing the Obligation of the Contracts. . . ."

[16] U.S. Constit. art. VI, states in relevant part: "the Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ."

[17] Section 13(c) of UMTA, 49 U.S.C. § 1609 provides:

(c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect

In applying this provision, the Department of Labor has encouraged transit authorities and unions to submit joint, agreed upon, assurances for review. These assurances are typically referred to as § 13(c) agreements. Over the years, the MBTA and the Transit Union have entered into a series of § 13(c) agreements. The most recent one, entered into on December 10, 1974, has been used repeatedly by the MBTA in grant applications, and by the Department of Labor for certification purposes.

The 1974 § 13(c) agreement includes the following assurances, which are directly relevant here:

> a) "All rights, privileges (including pension rights and benefits) of employees . . . under the existing collective bargaining agreements or otherwise shall be preserved and continued unless changed . . . as provided in said collective bargaining agreements." (§ 3a)
>
> b) "The collective bargaining rights of employees . . . including the right to arbitrate labor disputes . . ., to the extent such are provided for by applicable laws and/or existing collective bargaining agreements, or otherwise shall be preserved and continued . . . ." (§ 4)

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the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

> c) "Any . . . labor dispute . . . shall be referred to arbitration in accordance with the arbitration procedures set forth in any then-applicable collective bargaining agreement . . . . The term 'labor dispute' . . . shall be broadly construed and shall include any controversy concerning wages, salaries, hours, working conditions or benefits, . . . the making or maintaining of collective bargaining agreements, the terms to be included in such agreements . . . ." (§ 13(c)(a)(1)[18]

Ever since the enactment of Chapter 405, the Transit Union has claimed that the procedure there set out is inconsistent with this set of assurances and that the assurances must prevail over state law to the contrary.

The MBTA not only has denied that these assurances prevail, as a matter of federal law, over inconsistent state law, but also has denied that these assurances are inconsistent with Chapters 405 and 581. In its view the assurances guarantee the union rights only to the extent that those rights are consistent with current state law; the assurances do not protect the union against *changes* in state law. At the urging of the Department of Labor, the parties submitted the question of the meaning of these assurances to an arbitrator. In 1979 that arbitrator, William Fallon, ruled that Chapter 405 "and the MBTA's insistence on arbitrating interest disputes pursuant to those amendments [i.e. Chapter 405] constitute a conflict with pre-existing § 13(c) agreements executed by the parties." He did not determine which should take precedence. The parties continued to dispute whether the § 13(c) assurances are inconsistent with Chapters 405 and 581, and if so, which prevail.[19]

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[18] The 1974 § 13(c) agreement is set out in full in the appendix to the opinion of the district court below, 511 F. Supp. 312, 332-340 (D. Mass. 1981).

[19] We note that initially the MBTA apparently had power to enter into contracts for federal assistance which would impose regulations or practices in conflict with state law. Mass. Gen. Laws Ann. ch. 161A, § 29 (1976) (enacted in 1964) provides

C

The parties have brought three separate sets of legal proceedings designed to vindicate their legal positions. First, the MBTA challenged Arbitrator Fallon's award in state court. That proceeding is currently pending in the Supreme Judicial Court.[20] Second, the Transit Union brought a proceeding in the Commonwealth Superior Court to require the MBTA to comply with the Basic

broad authority to waive state law in the face of such a conflict and stated in part:

> . . . It is the intent of this section that the provisions of any federal law, administrative regulation or practice governing federal assistance for the purposes of this chapter shall, to the extent necessary to enable the commonwealth or its subdivisions to receive such assistance and not constitutionally prohibited, override any inconsistent provisions of this chapter.

This broad waiver authority was amended and restricted in 1980 by ch. 581, Mass. Gen. Laws Ann. ch. 161A, § 29 (cum. supp. 1981). The language quoted above and other languages providing authority to waive state law was repealed. Instead, the legislature provided:

> If the provisions of any federal law, administrative regulation, or practice governing federal assistance for the purposes of this chapter are inconsistent with any provisions of this chapter to the extent that the commonwealth or its political subdivisions are prohibited or potentially prohibited from receiving such assistance, the chairman of the authority shall, within thirty days after the federal government has notified him that an inconsistency may exist, notify the governor, and the clerks of the house and senate of such inconsistency.

[20] The suit in the Supreme Judicial Court of Massachusetts is a declaratory action pursuant to Mass. Gen. Laws Ann. ch. seeking a declaration that, *inter alia*, ch. 405 violated the § 13(c) agreement, that the arbitrator exceeded his powers in issuing the award, that the arbitrator's award constituted an unauthorized interpretation of state law, and that the award should be vacated.

The Transit Union removed the state action to federal court, 28 U.S.C. § 1441(b); however, it was remanded to the state court for lack of subject matter jurisdiction. *Adams v. Massachusetts Bay Transportation Authority*, 79-2059-S (D. Mass. December 24, 1980).

Agreement's arbitration procedures despite conflicting state law. The Superior Court enjoined violation of various provisions of the Basic Agreement for six months, but it indicated that (at least for the purposes of injunctive relief) the Basic Agreement may, as a matter of state law, have expired.[21] Finally, the Transit Union brought this action in federal district court, seeking a declaration that Chapters 405 and 581 are unconstitutional, and an injunction requiring the MBTA to arbitrate according to the terms of the Basic Agreement.

On March 17, 1981, the federal district court issued a preliminary injunction. 511 F. Supp. 312 (D. Mass. 1981). Focusing on "the central mutual consideration of the [1973 Basic] [A]greement and the core of the parties' reasonable expectations," 511 F. Supp. at 317, it held that *portions* of Chapters 405 and 581 violated the Contract Clause of the federal constitution. It found that the remainder of those chapters did not violate the § 13(c) agreement, for it interpreted that agreement as guaranteeing rights only insofar as they are consistent with current state law. It then ordered the parties to arbitrate under a procedure which the court itself created. The court modified the Basic Agreement to incorporate parts of Chapter 405 that it believed were constitutional.[22] The court issued a

[21] In Superior Court the Transit Union sought to enforce those provisions of the Basic Agreement that rolled over under §§ 600 and 601 against ch. 581. The Superior Court action was brought not only by the Transit Union, but also by Lodge 264 of District 38 of the International Association of Machinists and Aerospace Workers other unions who sought to enforce alleged rights under their respective contracts. *See Gallahue v. MBTA*, Mass. Superior Court, Suffolk County, No. 45917, slip op. at n.1 (January 7, 1981). For purposes of injunctive relief, the Superior Court enjoined violation of various portions of Lodge 264's collective bargaining agreement until March 2, 1981.

[22] Essentially, the district court ruled that ch. 405 violates the Contract Clause only insofar as it imposed arbitration by a single arbitrator in place of tripartite arbitration. 511 F. Supp. at 317. The court directed that binding interest arbitration be

clarifying order on May 15, 1981.[23] Both sides have appealed this district court decision. The Transit Union claims that the Basic Agreement's provision must be enforced as written. The MBTA claims that Chapters 405 and 581 are constitutional and govern.

D

The basic legal issues before us on appeal, then, are two. First, do portions of Chapters 405 and 581 violate the Supremacy Clause? Do they conflict with the § 13 assurances, and, if so, do the § 13(c) assurances prevail? Second, do portions of Chapters 405 and 581 unconstitutionally "impair" the obligations of a prior contract? We must also consider a further and totally different issue arising out of a separate claim made by Lodge 264 of District 38 of the International Association of Machinists and Aerospace Workers ("the Machinists").[24] This separate matter will be considered in Part IV of this opinion.

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conducted in accordance with ch. 405, "except that three arbitrators shall be chosen as provided in the collective bargaining agreements and the third or neutral arbitrator shall be (1) experienced in transportation, (2) a legal resident of the Commonwealth of Massachusetts, and (3) experienced in state and local finances." 511 F. Supp. at 318.

With respect to Chapter 581, the district court stated that it violated the Contract Clause "[t]o the extent that . . . [it] . . . withdraws questions of substance from collective bargaining . . . ." 511 F. Supp. at 318. The court further stated that "Chapter 581 is not applicable, because it conflicts with the essential provisions of a prior agreement, and its applicability is interdicted by Article I, Section 10, of the United States Constitution [the Contract Clause]." *Id.* at 319.

[23] *See* notes 49 and 57, *infra*. In its memorandum of May the district court ruled, *inter alia*, that §§ 8 and 9 of ch. 581 are in conflict with paragraph 4 of the 1974 § 13(c) agreement, and thus with the Supremacy Clause.

[24] The Machinists claim that their (separate) collective bargaining agreement prohibits the MBTA from laying off their members. The district court enjoined the proposed lay offs and the MBTA appeals.

II.

We first consider the Transit Union's claim that Chapters 405 and 581 are unconstitutional under the Supremacy Clause because they conflict with the 1974 § 13(c) agreement. The district court held that no such conflict exists, but here we shall assume the contrary. For one thing, an arbitrator, appointed under the terms of the 1974 Agreement has found that a conflict exists. For another thing, the plain language of the § 13(c) agreement quoted above appears to conflict with the two state chapters. Section 4 of the § 13(c) agreement, for example, states that arbitration rights are protected to the extent they are provided for by "applicable laws and/or existing collective bargaining agreements." Yet, the arbitration procedure set forth in Chapter 405 is arguably less favorable to the union than that contained in the "existing" (1973) "collective bargaining agreement." The district court read the language of § 4 to mean that it protected arbitration rights only insofar as those rights were also protected by "applicable law." 511 F. Supp. at 318-319. But the words "and/or" commonly mean "the one or the other or both." And thus § 4 would seem to protect arbitration rights provided by the 1973 "collective bargaining agreement" even if those rights are not provided for by "applicable law." We believe it reasonable for purposes of this opinion to assume that there is a conflict between state law and federal assurance.

The more difficult question is, in case of conflict, which prevails, federal assurance or state law? This is a question of Congressional intent. Barring some constitutional restraint, Congress plainly has the power to enact a law forbidding states that accept federal money from passing laws inconsistent with a federal statute, inconsistent with regulations made pursuant to the statute, or inconsistent with assurances made pursuant to the statute or those regulations. *E.g., King v. Smith,* 392 U.S. 309, 333 n.34 (1968). The issue here, therefore, is whether Congress intended § 13(c), or, to be more specific, whether it

intended assurances made pursuant to § 13(c), to override conflicting state law. If not, state law governs — although the federal statutory scheme may provide other remedies for violation of an assurance.

The language of the statute does not itself answer the relevant question. It simply provides that "[i]t shall be a condition of assistance . . . that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance." And, it goes on to list certain matters that the "protective arrangements" shall include. 49 U.S.C. § 1609(c). It would be consistent with this language that "arrangements" approved by the Secretary automatically invalidate conflicting state law. It is equally consistent with this language that such "arrangements" do not invalidate state law, but that a state with laws that prevent the making of "fair and equitable arrangements", cannot obtain or retain federal assistance. To decide the Supremacy Clause question, we have examined the UMTA statutory scheme in light of its legislative history and prior case law. Our examination convinces us that Congress intended state law, not § 13(c) assurances, to prevail in case of conflict. We base this conclusion upon express language contained in the legislative history, upon the fact that a contrary holding risks distorting UMTA's basic purposes, and upon the practical difficulties that would accompany a contrary result.

A

We have examined the statute's legislative history with care. In doing so, we are mindful that the courts ought not to void state statutes — particularly those dealing with local economic matters — in the absence of a clear Congressional intent to preempt them:

> If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a

> clear manifestation of the intention to do so. The exercise of federal supremacy is not lightly to be presumed.

Schwartz v. Texas, 244 U.S. 199, 202-203 (1952). *See New York Department of Social Services v. Dublin*, 413 U.S. 405, 413 (1973); *cf. National League of Cities v. Usery*, 426 U.S. 833 (1976). A careful examination of the legislative history reveals no evidence of any intent that a § 13(c) assurance supersedes state law; rather, that history reveals the contrary.

1. The first UMTA bills, introduced in Congress in the early 1960's, contained no labor protection provisions. Those provisions, which later became § 13(c), appeared in Congress when Secretary of Labor Willard Wirtz presented them to the Senate and to the House Committees on Banking and Currency in 1963. Secretary Wirtz first pointed out that the Labor Department had drafted the provisions after discussions with the Amalgamated Transit Union and the AFL-CIO. The unions argued that labor protection was needed for two reasons. UMTA money might be used by the states to buy existing private transit companies.[25] Under the law in some states if a private transit system became publicly owned, its workers would lose their rights to strike and to bargain collectively.[26]

[25] *See* H.R. Rep. No. 204, 88th Cong., 2d Sess. 4, *reprinted in* [1964] U.S. Code Cong. & Ad. News 2569, 2583; [hereinafter *House Report*]; S. Rep. No. 82, 88th Cong., 1st Sess. 29 (1963) [hereinafter *Senate Report*].

[26] During the hearings on UMTA, labor officials pointed to Dade County, Florida as an illustration of a situation where employees of a privately operated transit system lost their collective bargaining rights when the county took over the operation of the system. *See Urban Mass Transportation — 1963: Hearings on S.6 and S.917 Before the Subcomm. of the Senate Comm. on Banking and Currency*, 88th Cong., 1st Sess. 324, 325 (1963) [hereinafter *Senate Hearings*] (statement of Bernard Cushman); *Urban Mass Transportation Act of 1963: Hearings on H.R. 3881 Before the House Comm. on Banking and Currency*, 88th Cong., 1st Sess. 487 (1963) [hereinafter *House Hearings*] (statement of Andrew J. Bielmiller).

UMTA funds might also be used for automation leading to a loss of jobs.[27] Thus, as Secretary Wirtz explained it, § 13(c) was to provide "transitional" protection.[28]

Second, Secretary Wirtz explained how the labor protection provisions work. He made clear that the provisions would give the Labor Department a weapon — in the form of UMTA grants — that could be used to encourage states to modify laws to allow, for example, collective bargaining, or to look for ways around existing anti-union statutes.[29] If a state could not satisfy the Secretary that it had found some lawful method to provide the protection that § 13(c) required, the Secretary would prevent the state from receiving UMTA assistance. Thus, Secretary Wirtz testified that § 13(c) would "affect" state law, but it would not "override" state law.[30]

Third, the Secretary emphasized the breadth of the discretionary power that § 13(c) gave to the Labor Department and the "flexibility" with which that discretion must be exercised.[31] Thus, he told the House Committee that the Labor Department had the need for "flexibility" in mind "when the standards in the proposal were drafted."[32] The provisions provided flexibility both because the standard used — "fair and equitable arrangements" — was a highly general one and because the statute allowed the Secretary to take "account of the fact that different answers may be appropriate in different cases."[33] Indeed, in response to questioning, the Secretary stated that the provision did not even require him to withhold funds from a state with a law prohibiting collective bargaining among municipal employees. Even in such a case he would search for ways

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[27] *See* authorities cited at note 25, *supra*.

[28] *Senate Hearings, supra* note 26, at 308.

[29] *See* note 34, *infra*.

[30] *Senate Hearings, supra* note 26, at 312-313.

[31] *House Hearings, supra* note 26, at 482.

[32] *Id.*

[33] *Id.*

to work out arrangements that would allow the state to participate in the program.[34]

Fourth, the Secretary specifically focused upon the question of whether § 13(c) assurances would supersede state law. In response to questioning in the Senate, he said, "I should like it quite clear that I think that there should be no superseding here of the State law."[35] The Senate Committee Report on the Bill subsequently stated,

> In regard to the question as to whether these [§ 13(c)] provisions would supersede State labor laws, the committee concurs in a statement made by the Secretary of Labor "that there could be no superseding of State laws by a provision of this kind."[36]

The Secretary also responded to a question by a Congressman about the relation of § 13(c) to state law by saying that the Labor Department's proposal "is submitted on this basis . . . that the state laws must control."[37] When questioned by Congressman Wilson about whether he anticipated the "need for changes in any State laws in order to qualify any authority for funds under the provisions of the amendment", Secretary Wirtz responded:

> We are not relying upon any such changes, or assuming any such changes. *We are also assuming that the State laws would be controlling in the situation.* But, on the constructive side of my answer, it is also a responsible determination in the light of experience that there would be few, if any, situations, in which the interests of a community in this program where State laws are applicable and practices applicable to collective bargaining would enter and the interests reflected in this proposed amendment could

[34] *House Hearings, supra* note 26, at 482-483, 484-485.

[35] *Senate Hearings, supra* note 26, at 313.

[36] *Senate Report, supra* note 25, at 29.

[37] *House Hearings, supra* note 26, at 482.

[38] *Id.* at 486.

> not and would not be reconciled affirmatively. It would be possible in our judgment to take care of that. (emphasis added).

In sum, as seen by the Secretary of the Department that drafted § 13(c) (as well as by the Senate Committee that reported it), that section, together with UMTA funds, provided the Department with strong, flexible and discretionary power to encourage states to modify or to find ways around state laws or practices that, for example, inhibited collective bargaining. That section, in their view, clearly did not give the Secretary the power to override state law.

2. On the floor of the Senate, Senator Williams, one of the bill's chief sponsors, Senator Sparkman, the Chairman of the relevant subcommittee, and Senator Morse, a leading advocate of labor protection, all stated that § 13(c) was not intended to override state law. The reason for this unusual degree of explicitness is that two senators — Tower and Goldwater — claimed the contrary and sought to eliminate or to modify that section. Senator Tower based his claim upon the fact that the Senate Committee had struck out a proviso that would have allowed the "encouragement of collective bargaining rights to the extent not inconsistent with state law." 109 Cong. Rec. 5322, 5415 (1963).[39] He was joined by Senator Goldwater

[39] Senator Tower stated:

> Another matter relating to the labor section is extremely important. A number of States have, in one form or another, restrictions prohibiting certain labor activities by employees of the State and its political subdivisions. Would Federal assistance be given to States whose labor laws conflict with the labor provision in this bill? Would the labor provisions in this bill supersede the laws of the various States? The Secretary of Labor indicated there would be no superseding of State law but said the question of whether there would be an effect was a somewhat different question. However, in section 10(c)(2) of the bill, in the language referring to the enforcement of the prevention of curtailment of collective bargaining rights

(who also sought to strike out § 13(c)).[40] Senator Williams responded to their argument by stating:

> . . ., the words "to the extent not inconsistent with State or local law" — approved in subcommittee — were deleted from the bill in full committee. From this, one can only assume that this measure could be enforced in a manner not consistent with State or local law.
>
> Secretary Wirtz, in referring in his testimony to the situation in Dade County — where, as I have mentioned, there was a loss of collective-bargaining rights, due to the establishment of a new transit system operated by the municipality — said that in the application of Senate bill 6 to situations of that kind:
>
> > There would be a question that would have to be squarely faced, as to whether or not Federal funds should be used in connection with a situation of that kind, unless better arrangements could be worked out for the preservation of collective bargaining rights.
>
> Will State laws be superseded, if not in one way, in another? The question is certainly raised as to whether the Administrator will be forced to deny assistance to certain States. Or would he deny assistance to certain States only until they changed their laws? The point is not at all clear, because no testimony was made available to the committee after the deletion of the words "not inconsistent with State or local law."109 Cong. Rec. 5322.

[40] Senator Goldwater remarked with respect to § 13(c) (also designated as § 10(c) or § 19(c) in various bills):

> The enactment of this provision would represent a complete reversal of the public policy of the United States, which for over a quarter of a century, as enunciated in the Wagner Act and the Taft-Hartley Act, has specifically excluded by definition, any State or political subdivision thereof from all obligations imposed by the Federal Labor-Management Relations Act, including the requirement to bargain collectively with representatives of its employees. Both the Wagner Act and the Taft-Hartley Act have long recognized the right of the States, local governments, and communities to regulate and manage their affairs and their arrangements with their employees free from Federal interference and control.
>
> I might say in this connection, Mr. President, that many States have laws which prevent bargaining with unions in the area of public employment. This section of the bill

> This provision [i.e. § 13(c)] is truly ancillary to the thrust of the transportation program. It is only included in the interest of fairness and equity. If as a result of the expeniture of Federal funds, a railroad employee having a lifetime of contributions to a pension system were to lose it because his railroad was taken over by the public, that would be grossly unfair. This provision protects those rights which have been hard earned and enables them to continue.
>
> *The legislative history has to be corrected, however, because if the bill shall be enacted, we must have a record that will show that the bill does not preempt State law; it does not control or dominate with irrevocable authority local situations.*The bill provides for the encouragement of collective bargaining. That does not put the force of a mandate on a community. . . . I do not believe we can pass a law which would change Sate law; and we do not attempt to do so. . . .

Id. at 5417. (emphasis added.)[41] Senator Sparkman added a

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would preempt such laws and such ordinances as passed pertinent thereto by the local authorities.

* * * * * *

If this language remains in the bill, I am afraid we shall again be preempting established State laws, city ordinances, county ordinances or laws, whichever pertain.

As I said a moment ago, if the local government wishes to extend the collective bargaining rights, wages, working conditions, and so forth, with no right to strike, that is up to the local government, be it city, county or State; but if the United States moved in with the language contained in subsection (c) of section 19, it would have the effect, I believe, of preempting State law in this area.

109 Cong. Rec. 5415.

[41] Following Senator Williams' statement, this exchange ensued:

> MR. MILLER. Is it the intention, so far as the Senator from New Jersey and the committee are concerned, to the best of the Senator's knowledge, that the provision which is the subject of the amendment of the Senator from Arizona shall not be inconsistent with State law?
>
> Mr. WILLIAMS of New Jersey. Is that another way of saying that it cannot preempt or be a substitute for State law?

similar view, *id.* at 5418[42] and the effort to strike the section was defeated. *Id.* at 5420.

Mr. MILLER. I should think so.

Mr. WILLIAMS of New Jersey. That is my answer. It was the same answer the Secretary of Labor gave to the committee.

Mr. TOWER. Mr. President, will the Senator from Arizona yield, that I may propound a further question to the Senator from New Jersey.

Mr. GOLDWATER. I yield for that purpose.

Mr. TOWER. If that is the case, why did we strike from the bill, reported by the Committee on Commerce, on page 26, line 17, the collective bargaining section: "to the extent not inconsistent with State or local law"?

If it is our intent not to be inconsistent with State or local law, why was that provision deleted?

Mr. WILLIAMS of New Jersey. The answer is very simple. The provision should not have been included in the first place. If we had not made a mistake in the first place by doing what was unnecessary, it would not have been necessary to delete that provision.

Mr. TOWER. I still do not understand the point in taking it out if, as the Senator has said, it is not the intent to be inconsistent with State law.

Mr. WILLIAMS of New Jersey. Must we, in every paragraph of every bill, say, "The action under the authority of this legislation shall be in conformity with the Constitution of the United States"?

Mr. TOWER. What reflects legislative intent more clearly than the language which was deleted from the bill?

Mr. WILLIAMS of New Jersey. I am sure the Senator knows that if one makes a mistake, he should not try to preserve it. In our legislative history, shall he magnify a mistake which we made together?

109 Cong. Rec. 5417-5418.

[42] Senator Sparkman's remarks, and the reactions of Senators Goldwater and Towers were recorded as follows:

Mr. SPARKMAN. . . . I know that the language was written. It was done clearly with the idea that while there would be an encouragement of a continuation of collective bargaining rights, it was not intended to supersede State laws. I believe the questioning of the Secretary of Labor indicates our concern about that. It was not our intention to supersede State laws, and we do not intend, I am sure, to do so. We do not believe that the language has that effect.

Senator Tower then sought to amend § 13(c) to require only arrangements "consistent with the laws of the State in which the project is located." *Id.* at 5421. Again he

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Mr. GOLDWATER. If we are to depend on the Secretary's testimony for legislative history, neither side has much of a leg to stand on, because this language is about as fuzzy-wuzzy as any I have ever tried to read. It reads like some of the texts on proper punctuation, because when one gets through reading it, it is just a lot of language.

Mr. TOWER. Actually, the Secretary was testifying on the basis of the language he submitted to the committee, not the language which was finally provided in the bill.

Mr. SPARKMAN. That is correct.

Mr. President, will the Senator from Arizona yield further?

Mr. GOLDWATER. I yield.

Mr. SPARKMAN. I admit that in reading the Secretary's answer, there is a chance of someone's misunderstanding it. But if the entire statement is read, I think we find that he clearly said it will not supersede State laws.

He was asked, "Does it affect them?" He replied, "That is different" — and it is. If it has any effect whatever on them, that would be covered by the word "effect." I think the Secretary was splitting hairs when he tried to make that distinction. Of course it might have an effect upon State laws, but even in that connection he repeated his statement that it will not supersede or displace or override them.

Mr. GOLDWATER. Let me read what Secretary Wirtz said, as it appears on page 313. His statement was made in answer to a question by the Senator from Texas [Mr. Tower]:

> But I should like it quite clear that think that there could be no superseding here of the State law.

But that is not a statement on which one could rely with any conviction. He merely said he thought there could be no superseding of State law. . . .

Mr. SPARKMAN. Let me point out that at another place Secretary Wirtz said "surely" this amendment would not supersede State laws.

Mr. GOLDWATER. On what page is that statement to be found?

Mr. SPARKMAN. On page 312, near the bottom.

Mr. GOLDWATER. But he added "to the best of my knowledge."

109 Cong. Rec. 5418.

argued that without this proviso § 13(c) might override state law. The amendment was defeated, in part, because, as Senator Williams stated again and again, it was unnecessary: § 13(c) did not supersede state law. *Id.*[43] The real issue at stake, however, was not the question of override; the real issue was whether the Secretary of Labor would have the power to use § 13(c) as a weapon to encourage states to modify anti-union laws or to look for ways around those laws in the case of municipal transit workers (particularly those "acquired" from private companies with UMTA funds.) Senator Tower's amendment would have severly limited the Secretary's power to insist upon changes in state law as a condition for receiving funds — the very power that Secretary Wirtz had sought. The defeat of that amendment allowed him that power. Senator Javits explained the matter clearly:

> The reason I oppose the amendment is that I believe the provisions with respect to labor are in balance now, so far as Senators like myself are concerned. I should like to state my understanding of the situation and why I believe the amendment will complicate it rather than improve it.
>
> My understanding of the amendment is that the Secretary of Labor, under the bill, cannot supersede State law. If State law makes it impossible for the employees of municipal transit systems to bargain collectively, then it makes it impossible. There is nothing in the bill that can override it. Indeed, I doubt that the Constitution will permit it, and I doubt that it can be done under any phase of the Taft-Hartley law.

[43] Senator Williams also stated:

> To provide specifically that the rights could not be inconsistent with State law would be to imply that without such language there is the possibility of the program being inconsistent with State law which we know is not the fact. If the language is put in, it seems to me, while it might seem a small matter in respect to this bill, it would set a precedent for other legislation, which I think would be dangerous.

Id. at 5423.

> However, what it does, by not mentioning the proposition is to enable the Secretary of Labor . . ., to go into a State where a right-to-work law or some other law deprives the municipal employees — that is, employees of the transit system — of collective bargaining rights. Perhaps because the Administrator has money to give out, some States may be induced to make some accommodation on that score by the necessary exemption from the law or any interstate compact entered into with other States.
>
> Therefore, we have a balanced scheme. We do not override the law; at the same time, we do not compel the Federal Government to go in where the law is adverse to the interest of labor and labor's own point of view, and perhaps also even give encouragement to exempt a situation of this kind where the State desires to get this type of Federal help.
>
> I think that is giving something on both sides, while at the same time not giving the Administrator instructions, which is what the amendment would do, that he must go into such States, notwithstanding the fact that the municipal transit system workers might be deprived of collective bargaining rights.
>
> Therefore, I believe the amendment should be rejected.

109 Cong. Rec. 5422 (1963).

Subsequently, Senator Morse, a strong supporter of labor protection, added that under § 13(c), "The state can continue its state policy if it wishes to; but . . . the State should not be allowed to receive Federal money with which to continue a policy that is in conflict with sound Federal policy." *Id.* at 5672. He added that the final § 13(c) provision "does not supersede any State policy." *Id.* at 5673.

Thus, the Senate debate reveals not a single senator who intended § 13(c) to override conflicting state law. It contains explicit statements by sponsoring senators that they intended the contrary and believed that § 13(c)

carries out their intent. The senatorial remarks to the contrary are not supported by legal argument and were made by senators as part of an argument for an amendment that went well beyond removing any direct conflict between § 13(c) and state law.

3. The Senate debate was repeated in the House of Representatives. Some Congressmen articulated fears similar to those of Senators Tower and Goldwater. They feared that the legislation would override state law. *See, e.g.*, 110 Cong. Rec. 14979 (remarks of Rep. Taft). The bill's sponsors, however, assured the House that § 13(c) was not intended to override conflicting state law. Thus, Congressman Multer stated that "[n]othing in this bill and nothing in any amendment thus far adopted will infringe upon local law, whether it be of a State or municipality." *Id.* at 14980. And, Congressman Rains argued "that there is not one line in this bill that would vitiate in any way any State or local law. . . ." *Id.*

In sum, the legislative history reveals one explicit statement after another, made by the bill's drafters, the bill's sponsors in the Senate, and those who sponsored it in the House, that § 13(c), while designed to prod the states, is not intended to lead to the invalidation of any state law.

B

It might be argued, however, that this legislative history does not dispose of the matter because it does not explicitly consider the effect of § 13(c) on new state law enacted *after* the state has accepted UMTA funds. Indeed, the union here does not argue that § 13(c) assurances override pre-existing state law; it claims they override subsequently enacted state law. We do not believe, however, that this distinction is determinative for the following reasons.

First, there is nothing in the legislative history of UMTA suggesting a need to draw this distinction. Rather, the history quoted above suggests that the senators and

congressmen who drafted, sponsored, and voted for the bill believed that § 13(c) would not override *any* state law. And, there is no indication at all that both the statute *and* the detailed assurances given pursuant to § 13(c) were intended to predominate in case of conflict.

Second, if as the Transit Union contends, § 13(c) assurances override state law, Congress, in enacting § 13(c), to a significant extent federalized collective bargaining with local transit unions. Section 13(c) assurances consist of detailed documents, negotiated between transit authority and union, containing hosts of conditions related to wages, hours and working conditions — conditions that could govern the relations between the parties for years to come. To give these documents the authority of federal law overriding state law to the contrary would transfer predominate legal authority for local transit labor relations from state to federal government. The statute would have created a federal involvement in local transit labor relations akin to that which now exists with respect to railroad and airline workers. *See generally International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 687 (1963).

Whether or not such a federal presence is desirable, we cannot interpret the ambiguous language of § 13(c) to create it without a fairly clear indication that such was Congress's intent. Unlike railway and airline workers, we are here considering workers for *local* transit companies whose employers, by and large, are municipalities or state governments. *Cf. National League of Cities v. Usery, supra.* Moreover, in the National Labor Relations Act Congress explicitly exempted public employees, such as MBTA workers, from federal labor legislation. *See Local Division 589, Amalgamated Transit Union v. Amalgamated Transit Union*, 295 F. Supp. 630, 632 (D. Mass. 1969). Had Congress intended to grant the Secretary of Labor NLRB-type (or more) power to override state law governing these local public employees, one would expect to find some indication that Congress at least thought about the

matter. But instead, the legislative history is silent. Not a word indicates that Congress intended such a result. The unions in 1963 urged no such outcome.[44]

To the contrary, the legislative history suggests that Congress was sensitive to the local nature of local transit; it "expected that specific conditions [in § 13(c) assurances] normally will be the product of local bargaining and negotiations;" *Senate Report, supra* note 25, at 28; *see House Report, supra* note 25, [1964] U.S. Code Cong. & Admin. News at 2584-2585;[45] and its members made the many statements previously discussed suggesting the legal supremacy of state law.

Third, § 13(c)'s framers intended a limited set of provisional protections. Secretary Wirtz testified that "we are concerned particularly only about the *transitional* effects upon particular employee groups . . . [caused by] consolidation, merger, acquisition of various lines or the

[44] Indeed, the prime concern advanced by labor leaders with respect to § 13(c) was that while they agreed with its objectives, it was excessively general. Thus, they proposed a more detailed amendment, which provided, in part, that fair and equitable arrangements "shall be available to all . . . employees and shall not be limited to employees of existing mass transportation systems but shall "include employees employed on any new project, system, line, operation, or facilities. . . ." *House Hearings, supra* note 26, at 494-495 (statement of Andrew J. Bielmiller). In particular, they pressed that a provision be added which would authorize binding arbitration, *id.*, a proposal which was rejected by Congress.

[45] We note, moreover, that the U.S. Department of Labor has recognized the validity of state law in its implementing regulations. 29 C.F.R. § 215.3(a)(2) (1980) provides:

> In instances where state or political subdivisions are subject to legal restrictions on bargaining with employee organizations, the Department of Labor will utilize special procedures to satisfy the Federal statute in a manner which does not contravene state or local law. For example, employee protective terms and conditions, acceptable to both employee and applicant representatives, may be incorporated into a resolution adopted by the involved local government.

establishment of new systems besides or in some cases replacing old systems [or by the] establishment of programs of technological improvement." *Senate Hearings, supra* note 26, at 308 (emphasis added.) To erect upon § 13(c) assurances a near permanent set of specific collective bargaining conditions which the state cannot change is to go beyond this limited purpose.

Fourth, to find that specific § 13(c) assurances override state law would also go beyond § 13(c)'s objective of assuring "fair and equitable" arrangements. Clearly, a state law could modify a particular § 13(c) assurance without inevitably bringing about an unfair or inequitable result. It has not been shown, for example, that the new system provided by Chapters 405 and 581 is basically unfair or inequitable; it is simply claimed that those chapters change the 1973 Basic Agreement permanently frozen in detail by the 1974 assurances. Congress's general intent to secure fair arrangements does not require the implementation of any *particular* set of detailed provisions. Indeed, if the specific detailed provisions of a § 13(c) assurance prevail over *any* conflicting change in state law, the Secretary of Labor would lose any ongoing power to exercise discretion — to decide whether or not a change makes the state system as a whole unfair to the transit workers. This result would be anomalous given a legislative history stressing the need for flexibility and discretion. *See* note 34. *See also Kendler v. Wirtz,* 388 F.2d 381, 383 (3rd Cir. 1968); *City of Macon v. Marshall,* 439 F. Supp. 1209, 1223-1224 (M.D. Ga. 1977).

Fifth, § 13(c) assurances need not override state law to make § 13(c) enforceable. The threat of receiving no further UMTA funds would often prevent a state currently receiving those funds from changing its laws contrary to the policy of § 13(c). If not, the Secretary might halt the flow of funds or take other appropriate action. In any event, such an enforcement scheme is more consistent with Congressional intent than the alternative urged upon us by the Transit Union; namely, that § 13(c) permanently

binds states to the details of § 13(c) assurances and referenced collective bargaining agreements entered into perhaps a decade earlier, regardless of whether changes in state law are, in any overall sense, unfair. Even if such a system is desirable, the legislative history of UMTA suggests that Congress did not intend to create it.

C

The Transit Union has cited several cases that it believes stand for the proposition that § 13(c) assurances supersede state law. We have found no case, however, which is both directly on point and which considers the issue in detail. The Union cites many cases which deal with *other* federal statutes. These include *International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. at 689-91 (§ 204 of the Railway Act, 45 U.S.C. § 184); *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 291-294 (1958) (Reclamation Act of 1902); *International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283, 297-297 (1959) (§§ 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158) *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-457 (1957) and Teamsters Local v. Lucas Flour Co., 369 U.S. 95, 102-103 (1962) (substantive law to be applied in suits under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 184). In each of these cases, the Court held that federal law is preemptive. Yet, these cases are not persuasive here where we deal with a different statute, with different statutory objectives, and with a different legislative history.

Most of the UMTA cases cited by the Union do not deal with the precise question here at issue. Thus, in *Local Division 714, Amalgamated Transit Union, AFL-CIO v. Greater Portland Transit District*, 589 F.2d 1 (1st Cir. 1978) we decided a jurisdictional question. We held only that a union "does have a federal cause of action, implied from UMTA § 13(c), to enforce the labor protective arrangements to which the [Greater Portland Transit] District agreed to as a condition of federal financial assistance under the Act." 589 F.2d at 16. We further

noted that future "enforcement litigation will surely involve interpreting the protective arrangements in light of the purposes and policies of § 13(c), as well as resolving issues relating to the interplay between federal and state labor policies and possible supremacy clause problems." *Id.* at 13. We did not decide the question of whether § 13(c) requires that state law be subordinated to § 13(c) assurances. The Transit Union has cited language in that case that might imply such subordination. To the extent that it does so, however, we hereby disapprove it.

Several other cases cited also deal with the same jurisdictional question at issue in *Greater Portland*. Thus, the Sixth Circuit, *Local Division 1285, Amalgamated Transit Union v. Jackson Transit Authority*, 650 F.2d 1379 (6th Cir. 1981); the Seventh Circuit, *Local Division 519, Amalgamated Transit Union v. LaCrosse Municipal Transit Utility*, 585 F.2d 1340 (7th Cir. 1978); and the Eighth Circuit, *Division 1287, Amalgamated Transit Union v. Kansas City Area Transportation Authority*, 582 F.2d 444 (8th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979), also reached the conclusion that a claim of breach of a § 13(c) agreement sets forth a dispute cognizable in federal court;[46] in none of these cases did the court explicitly explore the problem of a conflict with a state law, and in none did the court decide whether, as a matter of general principle, assurances provided under § 13(c) govern in the face of a conflicting state statute.

We recognize that there are dicta in *Jackson* and *Kansas City Area Transportation Authority* which appear to support the Transit Union's position.[47] And, subsequent to

[46] Similarly, *see Division 1235, Amalgamated Transit v. Metropolitan Transit Authority*, 650 F.2d 1389 (6th Cir. 1981); *Division 1212, Amalgamated Transit Union v. Chattanooga Area Regional Transportation Authority*, 483 F. Supp. 37, 39 (E.D. Tenn. 1979).

[47] In *Jackson, supra*, the Sixth Circuit stated:

> It is undisputable that Section 13(c) reflects national labor policy. See 109 Cong. Rec. 5670. Indeed, the legislative history reveals that several senators were concerned

the decision of the Eighth Circuit, a district court ruled, in an alternative holding, that where state law and a § 13(c) agreement are in conflict, state law must yield. *Division 1287 v. Kansas City Area Transportation Authority*, 485 F. Supp. 856, 863-864 (W.D. Mo. 1980). *But see generally*

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about possible conflicts between Section 13(c) and state law, particularly in the area of the right to strike. *Id.* at 5672-73. Senator Morse, the chief sponsor of the bill which became Section 13(c), assured his colleagues that state laws forbidding public employee strikes would supersede national labor policy, but *only* where the right to strike was concerned; *all other* collective bargaining rights would be protected. *Id.* at 5671-73. . . .

* * * * * *

Jackson points out, correctly, that Section 13(c) was designed to encourage flexibility in formulating labor protective "arrangements." Senator Morse himself suggested that if local law prohibits collective bargaining by municiple employees, alternative solutions such as entrusting management of the transit authority to a private commission which *could* legally bargain with the union might be explored. *See also* Department of Labor Guidelines, 43 F.R. 13558 (3-31-78). The point, of course, is not that Congress was willing to make allowances for local problems. Rather, the point is that to qualify for federal funds, municipalities *must*, one way or another, undertake to protect the collective bargaining rights required by national labor policy.

650 F.2d at 1385-1386.

In a similar vein, the Eight Circuit has stated:

> We recognize that under the laws of some states employees of public agencies are not accorded collective bargaining rights nor do they enjoy the benefits of such bargaining, including arbitration. We think, however, that when a state or a combination of states forms a public transit agency for the express purpose of obtaining federal money to enable it to take over the business of a private transit company, and where the agency in order to obtain the money enters into a § 13(c) agreement that calls for interest arbitration, the obligation to arbitrate is binding on the agency, regardless of general state law or policy.

Because the opinions do not explore the precise nature of the conflict between state statutes and federal assurances, we are uncertain of the extent to which their language directly conflicts with our holding here.

Division 580, Amalgamated Transit Union v. Central New York Regional Transportation Authority, 556 F.2d 659, 662 (2d Cir. 1977) (suggestive of support for proposition that state law need not yield when in conflict with § 13(c) agreement). Several unpublished opinions also lend support to the Transit Union's position. None of these opinions, however, consider the issue in depth, and we have determined not to follow them.

For these reasons, we hold that the specific detailed assurances given by a union and a transit authority to the Labor Department under (UMTA) § 13(c) do not invalidate a state law to the contrary.

III

The Transit Union also claims that Chapters 405 and 581 are unconstitutional because they impair the obligations of the 1973 Basic Agreement, thereby violating the Contract Clause of the United States Constitution. ("No State shall . . . pass any . . . law impairing the Obligation of Contracts. . . ." Art. I., § 10.) The MBTA disputes the district court's holding that portions of Chapter 405 and all of Chapter 581 violate the Contract Clause. We agree with the MBTA that these chapters do not violate the Clause.

For one thing, the Basic Agreement may well have expired before Chapters 405 and 581 took effect. Although language in the Agreement appears to extend it indefinitely into the future, a Massachusetts state court recently held that, at least for purposes of injunctive relief, the agreement has terminated. On January 7, 1981, the Massachusetts Superior Court, per Judge Young, stated that the Transit Union contract (among others) contains:

> language implying that the prior contract provisions remain in effect until a new contract is negotiated. For injunctive purposes, this Court concludes that it is unreasonable to interpret these provisions so as to continue the prior provisions forever. . . . Accordingly, for purposes of granting injunctive relief, this

> Court shall set a six month period to injunctive relief granted on the basis of such contracts since this seems a reasonable time within which the parties may renegotiate them.

Gallahue v. MBTA, Mass. Superior Court, Suffolk County No. 45917, slip op. at n.1 (January 7, 1981).[48] On July 1, 1981, Judge Young denied plaintiffs' motion to extend the injunction, presumably on the ground that the collective bargaining contract was no longer in effect. If Judge Young's opinion constitutes an authoritative interpretation of the Basic Agreement, the Contract Clause would not be violated, for Chapters 405 and 581 apply only to future negotiations,[49] when the Basic Agreement would no longer be in effect. It has been clear since 1827 that the Clause applies only to laws with retrospective, not prospective, effect. *Ogden v. Saunders*, 12 Wheat. 213 (1827). *See also* Schwartz, *Old Wine in Old Bottles: The Renaissance of the Contract Clause*, [1979] *Supreme Court Rev.* 95, 99.

For another thing, even if the Superior Court's decision is not to be taken as a definitive state interpretation of the Basic Agreement, there are strong reasons for believing that the Agreement should be given this interpretation for purposes of applying the federal contract clause. Ever since the *Charles River Bridge* case, it has been the law that public contracts are to be strictly construed in favor of the state. *Charles River Bridge v. Warren Bridge*, 11 Pet.

[48] *See* note 21 *supra*.

[49] Defendants have stated that the laws here at issue are designed to apply to MBTA contract negotiations subsequent to their enactment.

The federal district court also suggests in its supplementary memorandum of May 15, 1981, that the Contract Clause problem may no longer exist because the Commonwealth had asserted on May 13, 1981, "that the parties have agreed to terminate the 1973 agreement and write a new one." As the court goes on to note, however, the record is unclear on this point — and the Transit Union has asserted in this court that as far as it is concerned, the collective bargaining agreement remains in effect.

420 (1837); Schwartz, *supra*, at 99. In holding that a company's charter to operate a toll bridge did not bar the state from authorizing the construction of a competing free bridge, the Supreme Court stated: "'[A]ny ambiguity in the terms of the contract must operate against the [company] . . . and in favor of the public'." 11 Pet. at 543, *quoting Stourbridge Canal v. Wheely*, 2 B & Ad. 793. Similarly, the Court has written:

> Every reasonable doubt is to be resolved adversely [to the private party claiming under the contract]. Nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation and doubt is fatal to the claim. This doctrine is vital to the public welfare.

Fertilizing Co. v. Hyde Park, 97 U.S. 659, 666 (1878). This doctrine illustrates the deference that federal courts must pay to state legislation if the Contract Clause is not to become a serious obstacle to the enactment of social or economic legislation that the states believe is necessary.

It is possible to interpret the terms of the Basic Agreement in a way that suggests the Agreement has terminated. Of course, if taken literally, the language of the Agreement would make it perpetual. Sections 600 and 601 of the 1973 Basic Agreement were amended by the Memorandum of Understanding (the 1979 collective bargaining agreement)[50] to provide that the Agreement will continue in force until December 31, 1980, "and from year to year thereafter unless changed by the parties." A party desiring change shall give notice, and if no agreement is reached on those proposals, "the parties shall submit the disputed issues to final and binding arbitration as provided for in this Agreement." This language literally requires perpetual use of the 1973 arbitration system. It would prevent either party from *ever* denouncing the Agreement through termination and seeking a totally new

[50] *See* note 4 *supra*.

one, no matter how unsatisfactory it found the 1973 arrangement.

It is difficult to believe that the parties to the agreement thought they could bind their successors forever. Perpetual contracts would seem to be particularly inappropriate in the field of labor relations, where fluctuating economic circumstances ordinarily call for the ability to adapt to changes.[51] *See generally* D. Bok and J. Dunlop, Labor and the American Community 289 (1970) (unpredictable nature of long-term agreements). And, it seems unlikely that the parties in 1973 or 1979 believed that they had found a permanent solution to the MBTA's labor/management problems or that they thought they had prevented both the state and the Transit Union from ever again exercising their respective powers to achieve some other accommodation with changing realities. The parties were presumably aware that a perpetual agreement was unlikely to be enforceable at law. Not even in the area of property law — an area where legal relationships are traditionally stable and certain, have the courts allowed private parties to make arrangements lasting in perpetuity. *See* Restatement of the Law of Property § 370 (1944). State courts have interpreted commercial contracts that apparently called for perpetual arrangements, not to do so. *See Simons v. American Dry Ginger Ale Co., Inc.*, 335 Mass. 521, 524, 140 N.E.2d 649-665 (1957). And, where such an interpretation has proved impossible in public collective bargaining agreements, they have struck such provisions down as contrary to public policy. *See, e.g., Niagara Wheatfield Administrators Association v. Niagara Wheatfield Central School District*, 309 N.Y.B.2d 667, 669-670 (4th Dept. 1976). Massachusetts courts have recognized the particularly strong public interest at stake where government labor contracts are at issue; and, they have indicated their willingness to strike down or interpret

[51] Indeed, other "public employees" in Massachusetts are limited to collective bargaining agreements for a term not to exceed three years. Mass. Gen. Laws. Ann. ch. 150E, § 7 (cum. supp. 1981).

away provisions in such contracts that run contrary to public policy, by, for example, imposing undue restrictions upon the freedom of action of public authorities. *See School Committee of Boston v. Boston Teachers Union*, ___ Mass. ___, ___, 389 N.E.2d 970, 973-974 (1979); *Watertown Firefighters v. Watertown*, ___ Mass. ___, ___, 383 N.E.2d 494, 498 n.15 (1978).

Under these circumstances, the fact that the Basic Agreement is silent as to the parties' authority to terminate completely or to denounce the contract (as contrasted with the power to "change" the contract) might well be interpreted to allow them to do so. Consistent with the express language, the interest arbitration provision might be interpreted as forbidding total termination of the contract only *for a reasonable time* after expiration of the contract's express term — in this instance December 31, 1980. Under any such interpretation of the contract — similar to that apparently reached by the Massachusetts Superior Court — there is no contract clause problem present here.

Nonetheless, it is conceivable that state courts reviewing the Basic Agreement in related cases will reach a different conclusion. Because of the need for expeditious resolution of this litigation, we have also considered the Contract Clause question on the assumption that the "perpetual duration" provisions of the Agreement are to be read literally. In that case, the narrow question before us is whether two subsequently enacted state laws (Chapters 405 and 581) can constitutionally override those provisions of the contract that provide for indefinite (or perpetual) extension (or renewal) of the contract's terms. We believe that they can.

The Contract Clause does not make unlawful *every* state law that conflicts with *any* contract that contains terms contrary to its provisions. Any such interpretation would make of the clause an insuperable barrier to necessary state legislation. It would threaten to make the Constitu-

tion unworkable. *Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 428, 434-435, 443 (1934).[52] As the Supreme Court has stated, "literalism of the construction of the contract clause . . . would make it destructive of the public interest by depriving the state of its prerogative of self-protection." *W.B. Worthen Co. v. Thomas,* 292 U.S. 426, 433 (1934). Thus, the courts have interpreted the clause so as to harmonize the state's need to legislate in the interests of its citizens with the need to protect investors and other contracting parties against repudiation of a debt or obligation. In doing so, at least since the early 1930's, they have struck down state laws only infrequently.[53]

In applying the clause, courts have examined the strength of the relevant interests of the private parties and those of the state. They have considered the nature of the private party's investment, which could take the form of labor as well as capital: to what extent has a party *worsened his pre-existing circumstances* by entering into, and relying upon, the contract? Moreover, the courts have examined the extent to which the party might reasonably have relied upon enforcement of the contractual promise in order to protect his investment. Thus, it is not surprising that the courts have upheld laws where these interests are likely to be weak, such as where a law would have basically prospective application, *Ogden v. Saunders, supra,* or where a retrospective law would modify, not substantive rights, but pre-existing contractual remedies. *Penniman's Case,* 103 U.S. 714 (1881). *See Worthen Co. v. Kavanaugh,* 295 U.S. 56, 60 (1935); *Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. at 434 n.13 (collecting "remedy" cases); *Mason v. Haile,* 12 Wheat. 370 (1927). *See*

[52] *See generally* Comment, *Revival of the Contract Clause: Allied Structural Steel Co. v. Spannaus and United States Trust Co. v. New Jersey,* 65 Va. L. Rev. 377, 381-385 (1979).

[53] Until very recently, some commentators considered the clause a "dead letter". *See* G. Gunther, Cases and Materials on Constitutional Law 554 (10th ed. 1980); Schwartz, *supra* at 95-96.

also Sturgis v. Crowninshield, 12 Wheat. 122, 200, 201 (1819). As the Supreme Court recently stated, "a reasonable modification of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the express terms of an agreement." *United States Trust Co. v. New Jersey,* 431 U.S. 1, 20-21 n.17 (1977).

Courts have also examined the type of legislation at issue to determine the importance and strength of the state's interest in legislating. *See, e.g., Stone v. Mississippi,* 101 U.S. 814, 817-818 (1880). They have frequently held that contracts are impliedly limited by, and subject to, the implicit authority of the state to exercise its "police power". *E.g., Allied Structural Steel v. Spannaus,* 438 U.S. 234, 241 (1978); *Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. at 435-436; *Stone v. Mississippi,* 101 U.S. at 817. And, the Supreme Court has defined "police power" for Contract Clause purposes, "as an exercise of the sovereign right of the Government to protect the lives, health, morals, comforts, and general welfare of the people . . . ." *Manigault v. Springs,* 199 U.S. 473, 480 (1905). The state's "paramount authority . . . is not limited to health, morals and safety. It extends to economic needs as well." *Veix v. Sixth Ward Ass'n,* 310 U.S. 32, 39 (1940). This doctrine reflects the importance of allowing states to legislate freely on social and economic matters of importance to their citizens, modifying the law to meet changing needs and conditions.

Following this doctrine, and of direct relevance here, the Supreme Court has upheld state laws that invalidated prior contractual obligations in the field of transportation; *see, e.g., New Orleans Pub. Serv. v. New Orleans,* 281 U.S. 682 (1930); *Denver & R.G.R. Co. v. Denver,* 250 U.S. 241 (1919); *Atlantic Coast Line R. Co. v. Goldsboro,* 232 U.S. 548, 558 (1914); *Northern Pac. R. Co. v. Duluth,* 208 U.S. 583 (1908); and, it has upheld newly enacted state labor laws that specifically set aside previously existing contracts to the contrary. *See, e.g., American Federation of*

Labor v. American Sash Co., 335 U.S. 538, 540 (1949); *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 531-32 (1949).

An examination of the relevant interests in this case suggests those of the Transit Union are weak and those of the Commonwealth of Massachusetts correspondingly strong. For one thing, the Transit Union could not *reasonably* have relied upon the continued enforcement of the arbitration provision in the Basic Agreement as necessary protection for the investment of labor by its members. The very uncertainty as to the legality under state law of a contractual arrangement purporting to be perpetual would make reliance upon its lasting unreasonable. *See* p. 44 *supra*. Moreover, the contractual provisions at issue here are concerned with the form of the arbitral process and the procedure for determining wages, hours and working conditions; the provisions themselves do not set those terms.[54] They are thus procedural and therefore more akin to a contractual remedy than a contractual right. The Transit Union and its members cannot easily say what terms will result from the new procedure; or how those terms will differ from those that the prior procedure would have provided. They may fear the new procedure will lead to less favorable substantive terms; but so may creditors have feared that changes in contractual remedies (*e.g.* abolition of imprisonment for debt) would make it harder to collect their debts. Yet due to the diminished nature of the reliance involved, such procedural changes in remedy have long been allowed. *See* cases cited at p. 47, *supra*. Further this is not a case of investment given to the state with the expectation of the state returning it, securing its return, or returning an equivalent value through the enforcement at issue. The Transit Union's members have received the pay and working conditions they bargained for and in return for which they gave their labor. It is difficult to see how the promise that a

[54] And, the procedure was itself subject to change through use of the arbitration system.

particular arbitration procedure would be used indefinitely into the future — beyond the life of the express terms of the existing agreement — could have played more than a small role in an employee's decision to work for the MBTA. Finally, the Commonwealth, as far as possible, has sought to protect reasonable reliance and expectations by applying the laws at issue here only to future negotiations, when contracts expire subsequent to the enactment of those laws.[55]

For another thing, the state's interest in legislating in this area seems sufficiently strong to overcome the prior contract's restraints. Public transportation is vital to the state and to its economy. The difficulties of finding satisfactory methods for resolving labor disputes — particularly in the field of public employment — are well known. D. Bok & J. Dunlop, *supra* at 228 *et seq.* The state plausibly claims that the problems of cost and efficiency are great. One piece of legislation at issue here (Chapter 405) was enacted after a long impasse in bargaining, and the other (Chapter 581) was enacted during a period of fiscal emergency as part of a government effort to keep the system from closing down. The state's interests here would seem at least as great as those present in other cases where the Supreme Court upheld a state law's validity. *See, e.g., Stone v. Mississippi, supra* (state forbids lottery despite its grant of a twenty-five year lottery franchise to a firm three years earlier); *Faitoute Iron & Steel Co. v. City of Asbury Park,* 316 U.S. 502 (1942) (state law altered a municipal bond contract); *El Paso v. Simmons,* 379 U.S. 491 (1965) (state law modified a land-sale contract by

[55] By contrast, in *Subway-Surface Supervisors Ass'n v. New York Transit Authority,* 44 N.Y.2d 101, 375 N.E.2d 384, 404 N.Y.S.2d 323 (1978), and in *Sonoma County Organization of Public Employees v. County of Sonoma,* 23 Cal. 3d 296, 152 Cal. Rptr. 903, 591 P.2d 1 (1979), the challenged legislation applied to the financial terms of existing contracts. In the former case, the legislation was upheld as "a necessary and appropriate" measure in a time of emergency. 44 N.Y.2d at 113, 375 N.E.2d at 390, 404 N.Y.S.2d at 329. In the latter case, the court struck down the statute, finding, *inter alia,* that no "emergency" existed.

reducing redemption period); *Fertilizing Co. v. Hyde Park, supra* (state law rendered company charter valueless); *Atlantic Coast Line R. Co. v. Goldsboro, supra* (state law restricted railway's contractually granted right to operate).

Moreover, it should be kept in mind that the state laws before us interfere with a prior contractual promise only to the extent that the promise would seek to prevent the state from *ever* changing the arbitration system. In other words, the narrow issue we are considering is whether the state can override a promise by one of its authorities made several years before that ties the hands of all future legislatures in an area of great importance to the public, concerning serious problems (labor/wage/cost/efficiency negotiations) where few would claim to have found even a provisionally satisfactory answer, let alone a permanent one. The Supreme Court has written that "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." *United States Trust Co. v. New Jersey,* 431 U.S. at 23. We do not believe that the Contract Clause grants the MBTA authority to restrict so significantly the power of future state legislatures.[56]

The Transit Union has pointed out, however, that recently the Supreme Court, in *United States Trust Co. v. New Jersey* wrote that a state law impairing the state's prior contractual obligation is valid only if "it is reasonable and necessary to serve an important public purpose." 431 U.S. at 25. *See also Allied Structural Steel v. Spannaus,* 438 U.S. at 243-244, 247. The Union argues that Chapters 405 and 581 are not "reasonable and

[56] *Cf. School Committee of Boston v. Boston Teachers Union,* 389 N.E.2d at 973: "Public policy . . . may limit the ability of a public employer . . . to bind itself to a given contractual provision or to delegate to an arbitrator the power to bind it."; *City of Taunton v. Taunton Branch of Mass. Police Ass'n,* 406 N.E.2d 1298, 1302 (Mass. App. Ct. 1980) (legislative wariness of imposing arbitration).

necessary" because there are other methods available — fare increases for example, that will resolve the MBTA's financial problems. The issue that the Union's claim puts before us is the extent to which we are to defer to the state legislature's judgment on these matters.

If we judge the legislature's actions "in the light of the facts made known or generally assumed", *cf. United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1937), those actions are supportable. The legislature clearly felt that Chapters 405 and 581 represented a necessary response to the problems before it. We cannot disagree. The record here reveals the seriousness of the problems facing the MBTA and the alternatives that had been tried. We are aware, as the Supreme Judicial Court has pointed out, that the financial crises which beset the MBTA in late 1980 "threatened the availability of essential services of transportation to such an extent as to endanger the health, safety and welfare of the community." *MBTA Advisory Board v. MBTA*, Mass. Adv. Sh. (1981) 403, 407. The complex controversies revealed by the conflicting affidavits filed in the district court themselves, suggest that there is no "obvious" alternative to the legislature's approach. Thus, even without engaging in the normal presumptions favoring state legislation, *cf. Morse v. Boston*, 253 Mass. 247, 252, 148 N.E. 813, 815 (1925), we would conclude that a legislative judgment that these statutes are both reasonable and necessary is itself a reasonable judgment.

We do not believe that *United States Trust* requires the federal courts to go further to reexamine *de novo* all the factors underlying the legislation and to make a totally independent determination about whether a fare increase or some other alternative would have constituted a "better" statutory solution. It is true that language in *United States Trust* suggests moderately close court scrutiny of legislation that conflicts with prior *public* contracts. To be specific, the Court stated that as to *private* contracts, "in reviewing economic and social regulation

. . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure. . . ." 431 U.S. at 22, 23. But, as to *public* contracts, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate. . . ." 431 U.S. at 26. This language itself, however, refers only to the need to avoid "complete" deference, and it is to be contrasted with the dissent's claim that in Contract Clause cases there should be "unusual" deference to the lawmaking authority of state governments. 431 U.S. at 46 (Brennan, J., dissenting). The very existence, and nature, of the complex factual controversies revealed in the record before us here support the legislature's judgment even without "complete" deference.

More importantly, *United States Trust* limits its stricter "review" approach to state laws in the "financial" area — laws which impair a state's "financial obligations." Indeed, it characterized the promise before it as "purely financial." 431 U.S. at 25. And, it specifically distinguished "as a threshold matter" state actions in other areas which might "fall within the reserved powers that cannot be contracted away." 431 U.S. at 24-25. In interpreting this language, we note that the *United States Trust* facts presented a paradigm of the type of protection that the Contract Clause was designed to offer — a protection given to those who invested money, time and effort against loss of their investment through explicit repudiation. *See* B. Wright, *The Contract Clause of the Constitution* 15-16 (1938); Hale, *The Supreme Court and the Contract Clause,* 57 Harv. L. Rev. 512 (1944). Unlike that case, there is no evidence here of any unreasonable effort to impose the costs or burdens of a new legislative policy upon a small group of previous investors, by, for example, depriving them of their investment. There is no reason to examine these provisions under the strict standard applied when rights specifically protected by the Bill of Rights or minority rights protected by the fourteenth amendment are at stake. *See Dandridge v. Williams,* 397 U.S. 471, 484 (1970).

Finally, it would be unusually difficult for a federal court to conduct a trial and determine *de novo* the reasonableness and necessity of each detailed provision of these statutes. The difficulties are well illustrated by the affidavits that the parties have submitted. The MBTA, for example, claims that salaries of MBTA workers in every job category are significantly higher than those of Massachusetts state and municipal workers doing comparable work (*e.g.*, MBTA clerk/typists and janitors earn 92 percent more than comparable state employees; machinists earn 84 percent more than comparable state employees; in 1979, two carshifters, one surface operator, one trackman, and one portable compressor operator each earned over $40,000, of which over $20,000 was overtime pay); that the average MBTA employee earns 79 percent more than the average manufacturing industry worker in Massachusetts; that the MBTA's cost per mile is 83 percent higher than the next most inefficient system; that the MBTA lacks flexibility to adjust job assignments or reclassify employees to meet changing needs; that "featherbedding" is rampant; that the MBTA is required to pay overtime rates to an employee during any day he works more than eight hours, even if he does not work more than forty hours that week; that restrictive work rules require the MBTA to hire full-time people for part-time jobs; and that the MBTA is unable unilaterally to subcontract out work. The MBTA also claims that its efforts to deal with these problems through the established collective bargaining arbitration procedures have proven unsuccessful; and, according to a former chairman, changes in work practices could obviate the need for a fare increase.

The Transit Union strongly denies these allegations. Its affidavits set forth contrary claims. It claims, for example, that the MBTA has not been unsuccessful under existing interest arbitration; that the MBTA has failed to use the bargaining and arbitration processes properly to deal with its problems, that the financial dependence by the MBTA upon tax revenues is largely a result of inadequate farebox revenues; that union work practices are not inflexible;

that the MBTA work force is efficient; that the MBTA has been able to subcontract out work; and that the MBTA enjoys above average productivity from its workers.

The district court was able to make a few findings about work rules insofar as the parties could agree about the facts.[57] But to go further and resolve disagreements, the

[57] In its supplementary memorandum of May 15, 1981, the district court stated:

> . . . There appears to be no dispute . . . about the existence of the following work rules for whatever significance they may have:
>
> a. Management may not make temporary reassignments of employees to jobs at locations different from their regular assignment.
> b. Employees may not be temporarily reclassified to meet unexpected needs.
> c. Rapid transit vehicles within a storage yard must be moved by a yard motorman and may not be moved by the regular operators of the vehicles even if there are not enough yard motormen on duty at a particular time. The yard motormen do not do any other work.
> d. Employees may not be assigned to two "details".
> e. Overtime is paid on the basis of an eight-hour day rather than a 40-hour week, and in any case must first be offered to senior employees on a system-wide basis. An employee may receive overtime without having worked a full 40-hour week.
> f. There is system-wide bidding for jobs on the basis of seniority.
> g. Motormen must be assigned to rail maintenance vehicles, but do not operate the vehicle or participate in maintenance.
> h. Schedules once assigned may not be changed to meet shifting rider demands, except on a three-month basis.
> i. Penalties must be paid to drivers on split runs if the break exceeds two hours. MBTA pays $2.6 million per year in such penalties.
> j. There are restrictions on the hiring of part-time drivers.
>
> I make no findings with respect to the effect of the foregoing work rules, or the justification for them, concerning which I have not heard evidence or argument. Furth-

court might well have to pass judgment upon such matters as a proper rate of pay, the way differently constituted arbitration tribunals are likely to function, the ease, as a political matter, of raising taxes or fares, the likely social and economic effects of a fare increase, the pressures (social and economic) that could lead to serious labor unrest, and so on. Answering these sorts of questions, and thereby determining the "reasonableness and necessity" of a particular statute, is a task far better suited to legislators than to judges. Thus, in the case before us, where economic or social legislation is at issue, some deference to the legislature's judgment is surely called for.

In sum, given the small amount of reliance that the Transit Union could reasonably have placed upon the perpetual continuation of the Basic Agreement, the importance of preserving the state's power to legislate in this area, the apparent reasonableness and necessity of the legislation, and the state's efforts to apply the statutes prospectively, thereby minimizing their interference with the parties' reasonable expectations, we hold that Chapters 405 and 581 do not violate the Contract Clause even if, as a matter of state law, the Basic Agreement is still in effect.

IV

We now turn to the different claim of the other appellee in this case, Lodge 264 of District 38, International Association of Machinists and Aerospace Workers (the "Machinists"). On July 1, 1976, the Machinists and the MBTA entered into their most recent collective bargaining agreement. Article II provided:

> The term of this Agreement shall commence as of January 1, 1976, and shall extend to and include December 31, 1977, and from year to year thereafter, unless either party shall give to the other party a

ermore, I express no opinion as to the relevance of any of the above work rules to any issue before me or before the Court of Appeals.

> notice . . . of a desire to change or terminate this Agreement.
>
> After receipt of such notice, the Agreement shall be opened up and the change or changes desired by either or both parties shall be considered.

Article XIV(A) provided:

> No Layoff — No employee, in any classification under the jurisdiction of the Association [the Machinists' Union], shall be laid off during the term of this Agreement.

On October 19, 1977, Charles E. Deignan, Business Representative of the Machinists, wrote the MBTA, stating "Notification is given that the undersigned hereby wishes to re-open the Agreement. . . ." On October 26, 1977, Robert R. Kiley, Chairman of the MBTA, wrote to Mr. Deignan that "the Authority hereby gives notice that it desires to make changes in the aforesaid Articles of Agreement, as amended." In the following months, the MBTA and the Machinists apparently negotiated, but they reached an impasse in July 1980. Though the Agreement also provided for interest arbitration, they could not agree, in light of Chapters 405 and 581, what form that arbitration should take.

Until March 2, 1981, the MBTA was prevented from making significant changes in the status quo by the state court injunction referred to at page 15 note 21, and page 41 *supra*. On March 3, 1981, however, the MBTA notified the Machinists that it intended to lay off fifty-three employees represented by that union, effective March 21, 1981.

The Machinists then intervened as a plaintiff in this action initiated by the Transit Union. The Machinists claimed protection under the 1974 § 13(c) agreement.[58]

[58] The MBTA contends that while the International Association of Machinists and Aerospace Workers signed the § 13(c) agreement, it did so in its capacity as an organization representing Boston and Maine Railroad employees, not MBTA em-

They joined the Transit Union in its Supremacy Clause and Contract Clause contentions. And they claimed that, in any event, as a matter of state law, their collective bargaining contract was still in effect and Article XIV of that contract prohibited layoffs.

The district court enjoined the layoff of the Machinists on the basis of state law. It reasoned that the Machinists' contract had, in fact, expired on December 31, 1977, and that the exchange of notices given in October 1977 had operated under the terms of the contract "to cut off the 'year to year' extended term." 511 F. Supp. at 316. However, because it appeared from an "uncontradicted affidavit" submitted by the Machinists that "the parties have treated the agreement as continuing in force up to this time, and have mutually enforced its terms as from time to time amended," 511 F. Supp. at 316-317, the district court ruled that "the MBTA is estopped to deny the continuation in force of the agreement dated January 1, 1976. . . ." *Id.* at 317. The court further stated:

> The proposed layoffs of members of the Machinists' Union is in direct violation of the explicit terms of the collective bargaining agreement, and while they may be justified they are properly the subject of arbitration under the existing agreement before they are effectuated. Such arbitration would not be interest arbitration subject to ch. 405 of the Act of 1978.

Id. at 320.

The MBTA appeals this ruling. It argues that it was inappropriate for the district court to invoke the doctrine of equitable estoppel. *See Celluci v. Sun Oil Co.*, 2 Mass. App. Ct. 722, 320 N.E. 919, 923 *aff'd* 368 Mass. 811, 331

ployees. (Affidavit of Paul J. Murphy, April 29, 1981). In November 1980, the attorney for the Machinists was informed of the MBTA's position that since Lodge 264 was not a signatory to the existing § 13(c) agreement, it could not invoke the protections of that agreement. This issue has not been briefed by any of the parties, and it is not necessary that we decide the matter here.

N.E.2d 813 (1974). The Machinists disagree. They add that the district court, in any event, should have found that the collective bargaining agreement did not terminate in 1977, that it was only "opened" for changes, and that its terms therefore continue to apply.

We are reluctant to conclude that at the time of its ruling the district court abused its discretion in issuing a preliminary "layoff" injunction. *See Nat. Tank Truck Carriers, Inc. v. Burke*, 608 F.2d 819, 823 (1st Cir. 1979). Yet, we note that the questions presented here are now entirely matters of state law. They are closely related to matters which have been, and may still be, subject to adjudication in the state courts. *See Gallahue v. MBTA, supra.* Moreover, the district court made its equitable estoppel ruling on the basis of what it described as an "uncontradicted affidavit" submitted by the Machinists that "the parties have treated the agreement as continuing in force. . . . ." 511 F. Supp. at 316-317. In its brief and in various opposition papers, the MBTA appears to dispute this assumption, thus undercutting a premise fundamental to the district court's reasoning. Also, given our holding here, it now seems unlikely that the Machinists can pursue any related federal claim. In addition, the district court wrote on March 17 that the injunction delaying the layoffs pending grievance arbitration was to remain in effect only for a "reasonable time pending the prompt completion of arbitration." 511 F. Supp. at 321. Under these circumstances, we believe it appropriate for the district court to reconsider the propriety of the injunction in light of present circumstances.

V

The decision to grant or deny preliminary injunctive relief ordinarily lies within the sound discretion of the trial court. *Grimard v. Carlston*, 567 F.2d 1171, 1173 (1st Cir. 1979). We will not lightly overturn that judgment. *Maceira v. Pagan*, 649 F.2d 8, 15 (1st Cir. 1981) (*see* cases cited therein). However, the "application of an improper legal standard" or the "misapplication of an improper legal

standard" or the "misapplication of the law to particular facts" provides a basis for reversal. *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981). We have found that Chapters 405 and 581 are constitutionally sound. For this reason, the Transit Union has failed to demonstrate likelihood of success on the merits, a prerequisite to the granting of preliminary injunctive relief. *Id.* at 1009.

Accordingly, to the extent that it is inconsistent with this opinion, the district court's order of March 17, 1981, as clarified on May 15, 1981, is vacated and the case is remanded for further proceedings consistent with this opinion.

Joint Appendix

Office - Supreme Court, U.S.
FILED
JAN 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE,
Petitioners,

v.

LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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JOINT APPENDIX

TABLE OF CONTENTS

	PAGE
Clerk's Certificate and Docket Entries	1a
Complaint	
Exhibits:	
A. Ordinance Creating Jackson Transit Authority	5a
B. Resolution Authorizing Jackson Transit Authority Contract with T. O. Petty	12a
C. "Section 13(c) Agreement" of July, 1966	15a
D. Agreement Between T. O. Petty and Local Div. 1285, A.T.U., June, 1966	21a
E. Agreement Between T. O. Petty and Local Div. 1285, A.T.U., April 1, 1975	31a
F. Letter from Jackson Transit Authority to Mr. Lee Roy Rinks, Union Representative, December 23, 1975	45a
G. Letter from Jackson Assistant City Attorney Sidney W. Spragins to Jackson Transit Authority Chairman Evan Davis, December 9, 1975	47a
Jackson's Motion to Dismiss	48a
Memorandum in Support of Jackson's Motion to Dismiss	50a
Answer of the United States Secretaries of Transportation and Labor	56a
Union's Memorandum in Opposition to Jackson's Motion to Dismiss, with Letter from Assistant Secretary of Labor Bernard E. DeLury to A.T.U. President Dan V. Maroney, Jr., December 9, 1976	60a

PAGE

United States' Motion to Dismiss or For Summary Judgment 82a

Memorandum in Support of the United States' Motion to Dismiss or For Summary Judgment 84a

Union's Memorandum in Opposition to the United States' Motion to Dismiss or For Summary Judgment 102a

Jackson's Supplemental Memorandum in Support of Motion to Dismiss 113a

Union's Supplemental Memorandum in Response to Jackson's Motion to Dismiss 118a

Union's Motion to Alter or Amend Judgment ... 123a

Order, dated February 23, 1978, Overruling the Union's Motion to Alter or Amend Judgment 126a

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

In The United States District Court for The Western District of Tennessee Eastern Division

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Civil Action No. 76-104-E

Local Division 1285, Amalgamated Transit Union, AFL/CIO/CLC,

Plaintiff,

vs.

Jackson Transit Authority, the City of Jackson, Wiiliam T. Coleman, Jr., Secretary of Transportation, United States Department of Transportation, and William J. Usery, Secretary of Labor, United States Department of Labor,

Defendants.

CLERK'S CERTIFICATE AND DOCKET ENTRIES

8/10/76—Filed complaint

8/26/76—Filed Motion of JacksonTransit Authority and City of Jackson for additional time to respond to complaint

8/31/76—Filed Order enlarging time for defendants Jackson Transit and City of Jackson to respond thru 9/29/76

9/29/76—Filed Motion to dismiss complaint with Memorandum in support of Motion to dismiss by Jackson Transit Authority and the City of Jackson

10/14/76—Filed Motion for extension of time by USA to respond to complaint

10/19/76—Filed Order extending time for USA to respond for additional 60 days

10/27/76—Filed Order extending time to respond by plaintiff to motion to dismiss until USA has responded

11/16/76—Filed answer of defendants, Usery and Coleman

11/30/76—Filed Motion for extension of time for plaintiff to respond to Motion to Dismiss

12/8/76—Filed stipulation of parties to allow to 1/7/77 to respond to motion to dismiss of Jackson Transit and City of Jackson

12/10/76—Filed Order extending time to 1/7/77 to respond to motion to dismiss of Jackson Transit and City of Jackson

1/4/77—Filed Motion for extension of time for Plaintiff to respond to Motion to Dismiss of Jackson Transit

1/4/77—Filed stipulation extending time for Plaintiff to respond to Motion to Dismiss to 1/14/77

1/7/77—Filed Order extending time for plaintiff to respond to Motion to Dismiss to 1/14/77

1/18/77—Filed Plaintiff's memorandum in opposition to the Motion to Dismiss by defendants Jackson Transit Authority and the City of Jackson

1/19/77—Filed Request of defendants Jackson Transit and City of Jackson for Hearing on Motion

2/9/77—Filed Motion to Dismiss or in the alternative Motion for Summary Judgment with memorandum of law in support of Motion to Dismiss or in the alternative for Summary Judgment of United States

2/22/77—Filed Plaintiff's Motion for extension of time to respond to the Motion to Dismiss or for Summary Judgment of defendants Coleman and Usery

2/24/77—Filed Order extending time, until 3/14/77 for plaintiff to respond to Motion to Dismiss or Summary Judgment filed by defendants Coleman and Usery

3/18/77—Filed Plaintiff's Motion for extension of time to respond to the Motion to Dismiss or for Summary Judgment of defendants Coleman and Usery

3/22/77—Filed Order extending time, until 3/25/77 for plaintiff to respond to Motion to Dismiss or Summary Judgment filed by defendants Coleman and Usery

3/25/77—Filed Plaintiff's memorandum in opposition to the Motion to Dismiss or in the alternative for Summary Judgment of the federal defendants

4/19/77—Filed supplemental memorandum in support of Motion to Dismiss by Jackson Transit Authority and the City of Jackson

5/5/77—Filed supplemental memorandum in response to the Motion to Dismiss by Jackson Transit Authority and the City of Jackson

11/14/77—Filed Motion of plaintiff for leave to file instanter a supplemental memorandum in opposition to defendants' Motion to Dismiss (copy of supplemental memorandum in opposition to defendants' Motion to Dismiss attached)

12/23/77—Filed memorandum Opinion, Defendants' motions to dismiss granted

1/3/78—Filed Motion to alter or amend judgment behalf plaintiffs

1/3/78—Filed response of defendants, Jackson Transit Authority and the City of Jackson to plaintiffs' Motion to alter or amend judgment

1/5/78—Filed Order on Court decision (case dismissed)

1/25/78—Filed supplemental memorandum in support of plaintiff's Motion to amend or alter judgment

2/10/78—Filed Motion of Plaintiff for leave to file instanter a supplemental memorandum in support of plaintiff's Motion to amend or alter judgment with supplemental memorandum in support of plaintiff's Motion to amend or alter judgment

2/21/78—Filed Motion for enlargement of time behalf of defendants Jackson Transit Authority and City of Jackson

2/23/78—Filed Order denying defendants' motion for enlargement of time to respond to plaintiff's motion

2/23/78—Filed Order overruling motion to alter or amend judgment

2/27/78—Filed memorandum in opposition to defendants' Motion for enlargement of time

3/17/78—Filed Notice of Appeal behalf plaintiff

4/12/78—Filed Motion to extend time for transmitting the record, behalf of plaintiff

4/13/78—Filed Order extending time to transmit record to 5/15/78

5/5/78—Filed Transcript of Hearing on Motions on 4/19/77, 1 volume

I, J. Franklin Reid, Clerk of the United States District Court for the Western District of Tennessee, do hereby certify that the above index of docket entries is a true and correct copy of all material docket entries as appear on the docket in this office this 5th day of May, 1978.

J. Franklin Reid, Clerk

by Barbara Hearn

Deputy Clerk.

In the United States District Court
for the Western District of Tennessee
Eastern Division

No. C-76-104E

Local Division 1285, Amalgamated Transit Union, AFL/CIO/CLC,

Plaintiff,

vs.

Jackson Transit Authority, the City of Jackson, William T. Coleman, Jr., Secretary of Transportation, United States Department of Transportation, and William J. Usery, Secretary of Labor, United States Department of Labor,

Defendants.

COMPLAINT

NOW COMES the Plaintiff, Local Division 1285, Amalgamated Transit Union, AFL/CIO/CLC, (hereinafter referred to as the "Union" or "Division 1285") by its attorneys, Jacobs, Burns, Sugarman & Orlove and Anthony J. Sabella, and makes the following Complaint against Defendants Jackson Transit Authority, the City of Jackson, William T. Coleman, Jr., the Secretary of Transportation, United States Department of Transportation, and William J. Usery, Secretary of Labor, United States Department of Labor:

1) Jurisdiction of this Court is based on 28 U.S.C.A. §§ 1331(a), 1337 and 1361 and the Urban Mass Transportation Act of 1964, 49 U.S.C.A. § 1601, *et seq.* (as amended 1968); pendent jurisdiction exists with respect to a cause of action arising from breach of contract.

2) Plaintiff Division 1285 is an unincorporated labor organization representing workers in the transit industry for the purposes of collective bargaining.

3) Defendant Jackson Transit Authority (hereinafter referred to as "JTA") is an agent of the City of Jackson, Tennessee, and operates a bus transit system.

4) The City of Jackson (hereinafter referred to as the "City") is a municipal corporation under the laws of and within the State of Tennessee (Ch. 158, Private Acts of 1915, State of Tennessee). The City created JTA by ordinance of April 5, 1966, to operate and manage a public mass transportation system as agent of the City (Text of ordinance is attached hereto as Exhibit "A"). By separate resolution the Board of Commissioners of the City expressly authorized the JTA Board of Directors "to execute an agreement with T. O. Petty for his active management of the Urban Transportation Facility owned by the City of Jackson . . ." (Text of resolution attached hereto as Exhibit "B").

5) Defendant William T. Coleman, Jr. is Secretary of Transportation, United States Department of Transportation.

6) Defendant William J. Usery is Secretary of Labor, United States Department of Labor.

7) JTA employs approximately 21 persons, eighteen (18) of whom are members of and represented for purposes of collective bargaining by Division 1285.

8) Division 1285 and Defendant JTA entered into an agreement signed on July 26, 1966, (copies of which are attached hereto as Exhibit "C"), as required by § 10(c) (now § 13(c)) of the Urban Mass Transportation Act of 1964, (hereinafter referred to as "UMTA") 49 U.S.C.A. § 1609(c) (as amended), as a condition of the receipt of federal funds under § 3 of the Act.

9) The agreement referred to in paragraph 8 (hereinafter referred to as the "§ 13(c) agreement") was certified by the Department of Labor by letter dated September 1, 1966, for specification in the grant contract of assistance applicable to Project No. TN-03-0002, approved by the Urban Mass Transportation Administration on November 14, 1966. The contract provided federal grants in the amount of approximately $279,000 to assist in the construction of a garage and the purchase of equipment, including twelve (12) new 35-passenger buses.

10) By the terms of the § 13(c) agreement, Defendants JTA and the City, which submitted the aforementioned grant application, agreed to be bound by the terms of the agreement between T. O. Petty as agent of JTA and Division 1285, and agreed:

> . . . that it will bargain collectively with the Union or otherwise arrange for the continuation of collective bargaining, and that it will enter into agreements with the Union or arrange for such agreements to be entered into, relative to all subjects of collective bargaining which are or may be proper subjects of collective bargaining with a private employer (¶ 5, Exhibit "C").

11) Also by the terms of the § 13(c) agreement, Defendant JTA and the Union agreed that successors to the management of JTA, including any private party or public agency would assume "all the obligations and liabilities of the Authority" with respect to the § 13(c) agreement and

> . . . comply with the requirements of Section 10(c) (now 13(c)) and shall proceed in such a manner as is necessary so as not to reduce or impair any rights, privileges and benefits which such employees of the transit system would have received or be entitled to, had the system continued under its former private management and operation (¶ 2, Exhibit "C").

Under its former private management and operation the employees of the Jackson transit system had been represented by Division 1285 and, from 1941 to 1966, had

enjoyed the protection of collective bargaining agreements negotiated by the Union leadership and the management of the system.

12) The current collective bargaining agreement, was entered into on April 4, 1966 (attached hereto as Exhibit "D") and amended most recently in June 1975, with an effective date of April 1, 1975, and an expiration date of April 1, 1978, (attached hereto as Exhibit "E"). The original agreement and subsequent amendments were negotiated and signed by T. O. Petty as managing agent of JTA.

13) Defendants JTA and the City breached the July 26, 1966 § 13(c) agreement in December 1975 by unilaterally declaring to be null and void the current collective bargaining agreement between Division 1285 and JTA (See letter of JTA attached hereto as Exhibit "F").

14) Pursuant to § 19 of the current collective bargaining agreement JTA and the City were obligated to implement cost of living increases as of January 1, 1976. Defendants unilaterally withheld such wage increases thereby breaching both the collective bargaining agreement and the § 13(c) agreement.

15) Defendants JTA and the City have further breached the § 13(c) agreement and the current collective bargaining agreement by demanding that Division 1285 enter into new collective bargaining sessions for the purpose of altering the wages and benefits of employees set forth in the current collective bargaining agreement.

16) On or about May 27, 1976, the Board of Defendant JTA breached the § 13(c) agreement and current collective bargaining agreement by changing unilaterally the sick and funeral leave, vacation and holiday benefits of members of Division 1285.

17) Defendant JTA has also breached the aforementioned agreements by threatening to suspend the dues

check-off for members of Division 1285, as secured by § 11 of the current collective bargaining agreement.

18) Defendants JTA and the City have threatened irreparable harm to the public and to members of Division 1285 by initiating actions to reorganize the operations of JTA on the basis of projected cost savings resulting from the illegal breach of the current collective bargaining agreement and in violation of the § 13(c) agreement.

19) Wages and the other rights secured by the collective bargaining agreement and threatened by JTA's attempted nullification thereof are worth in excess of $10,000 to both Division 1285 and to its members.

20) Defendant William J. Usery, Secretary of Labor, is responsible for determining whether Defendants JTA and the City are in non-compliance with the labor conditions certified by the Secretary of Labor for the grant contract referred to in Paragraph (9) and is responsible for taking appropriate action to ensure complaince.

21) Division 1285, through its International President, Daniel V. Maroney, Jr., requested, on January 29, 1976, a determination by the Secretary of Labor, William J. Usery, of whether the action of Defendants JTA and the City, in attempting to nullify the collective bargaining agreement and in thereafter breaching its provisions, and violated the § 13(c) agreement.

22) Defendant William J. Usery has failed to exercise his statutory duty to determine whether Defendants JTA and the City have violated the § 13(c) agreement and has failed to take steps necessary to ensure compliance with said agreement.

23) Defendant William T. Coleman, Jr., Secretary of Transportation, is vested with responsibility to administer UMTA and, pursuant to § 12(e), 49 U.S.C.A., § 1608(a) (as amended), is responsible for enforcement of the grant contract with the City of Jackson referred to in Paragraph

9, including the terms of the § 13(c) agreement, upon the determination of a violation thereof by the Secretary of Labor.

24) Plaintiff Division 1285 and its members are incurring continuing, irreparable and increasing damages by the denial of certain wage benefits and other rights and benefits guaranteed by the collective bargaining agreement.

WHEREFORE Plaintiff prays that this Court grant the following relief for Plaintiffs and against Defendants:

1) Grant a preliminary injunction herein against Defendants Jackson Transit Authority and the City of Jackson in order to restore the status quo prior to Defendant's breach pending the final determination of this action and until the further order of this Court, restraining them from:

(A) withholding wages, benefits or any other rights secured by the current collective bargaining agreement;

(B) selling, leasing or otherwise disposing of or encumbering in any way any of the property or equipment acquired in whole or in part through federal funds granted under § 3 of UMTA.

2) Order Defendants JTA and the City to comply with the § 13(c) agreement, including the arbitration provisions therein.

3) Order Defendants JTA and the City to comply with the current collective bargaining agreement with Division 1285.

4) Permanently enjoin the Defendants JTA and the City from violating any of the terms of the collective bargaining agreement or of the § 13(c) agreement.

5) Order JTA and the City to make whole all employees covered by the collective bargaining agreement by paying

all lost wages and restoring any other rights or benefits lost as a result of its illegal breach of the agreement with Plaintiff.

6) Permanently enjoin the Defendants JTA and the City from selling, leasing or otherwise disposing of or encumbering in any way any of the property or equipment acquired in whole or in part through federal funds granted under § 3 of UMTA, without a certification by the Secretary of Labor, filed with this Court, concerning the Defendant's compliance with the § 13(c) agreement between Defendants and Plaintiff.

7) Order Defendant William J. Usery to find that Defendants JTA and the City of Jackson have breached their § 13(c) agreement with Plaintiff Division 1285.

8) Order Defendants William J. Usery and William T. Coleman, Jr. to take appropriate action to enforce compliance with the § 13(c) agreement between Plaintiff and Defendants JTA and the City of Jackson.

9) Grant such other preliminary and permanent relief as may be appropriate and justified.

JACOBS, BURNS, SUGARMAN & ORLOVE,

By: _____
Counsel for Plaintiff

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EXHIBIT A

AN ORDINANCE TO CREATE AND ESTABLISH THE JACKSON TRANSIT AUTHORITY TO PROVIDE FOR HIS ORGANIZATION; TO PROVIDE FOR APPOINTMENT OF DIRECTORS TO SUCH AUTHORITY TO DEFINE ITS DUTIES AND POWERS.

WHEREAS, formal notice has been served upon The City of Jackson that the existing bus service within the City of Jackson will be terminated as of April 2, 1966, thereby leaving The City of Jackson without any form of mass transportation; and

WHEREAS, there does not appear to be any private source interested in establishing and operating bus service within the City of Jackson; and

WHEREAS, it is to the manifest best interest of The City of Jackson that bus service be maintained as a public function of The City of Jackson; and

WHEREAS, Section 6-1602 Tennessee Code Annotated does declare the operation of an "Urban Transit Facility" to be in the public interest and a proper municipal public purpose:

THEREFORE, BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF JACKSON:

Section 1. That there should be and is hereby created the Jackson Transit Authority, which said Authority is hereby charged with the duty and responsibility of operating within The City of Jackson and its environs and "Urban Transit Facility" for the providing of mass public transportation for passengers, under the conditions and limitations hereinafter set out.

Section 2. The management of the Jackson Transit Authority is hereby vested in a Board of Directors consisting of five members all of whom shall be citizens of The City of Jackson and shall serve without compensation.

The initial appointment of such Directors shall be for terms of one, two, three, four and five years, and annually thereafter directors shall be elected for five year terms. Directors shall be selected by a majority vote of the Board of Commissioners upon the recommendation of the Mayor. In the event of vacancy caused by death, resignation or other reason the remainder of the unexpired term shall be filled in like manner. The Board of Commissioners of The City of Jackson shall have the authority, for cause and after public hearing, to remove a Director from office.

Immediately upon appointment the Board of Directors shall meet and elect a President, Vice-President and Secretary of the Authority. The Board of Directors shall cause complete and accurate minutes to be kept in a permanent bound minute book of all proceedings had by such Board. The Board shall establish regular meeting dates at least monthly and more often if required for the proper transaction of its affairs.

Section 3. Said Board of Directors shall be and is hereby empowered to employ such personnel as may be necessary from time to time for the proper operation of an "Urban Transit Facility", to discharge employees from time to time as may be required and to make such rules and regulations as are necessary and proper for the efficient and proper operation of the system. The Authority shall have no power to borrow money or to pledge the credit of the City of Jackson, nor shall such authority make any purchase or enter into any contract involving obligations in excess of $5,000.00, without the prior approval of the Board of Commissioners of The City of Jackson expressed upon the minutes of such Board of Commissioners.

Section 4. The Jackson Transit Authority shall from time to time recommend to the Board of Commissioners of The City of Jackson a schedule of rates to be established for the carrying of passengers and the Board of Commissioners for The City of Jackson shall approve or modify such rates as may be in its discretion justified, it being the purpose of this public service to provide mass transporta-

tion in the most efficient manner, at the lowest possible cost to the public and on a self-sustaining basis if possible. The Board of Commissioners of The City of Jackson may review such rates from time to time on its own initiative. The Jackson Transit Authority shall only charge such rates as have been approved by the Board of Commissioners of the City of Jackson.

Section 5. The Board of Directors of the Jackson Transit Authority shall immediately after organization formulate and submit to the Board of Commissioners of The City of Jackson a system of accounting for the handling of the finances of the Jackson Transit Authority, such accounting method to reflect complete and accurate details of the handling of the authority's funds, to provide a monthly check of such accounting by a Certified Public Accountant to be selected by the Board of Commissioners of the City of Jackson, to provide quarterly reports of the financial condition of the Jackson Transit Authority to the Board of Commissioners of The City of Jackson, to provide an indemnity bond for all persons handling funds of such system and to provide an annual audit by the Certified Public Accountant referred to herein.

Section 6. That the Board of Directors of the Jackson Transit Authority shall at once formulate and recommend to the Commissioner of Public Property of the City of Jackson a program of necessary insurance, and such insurance shall forthwith be placed by the Commissioner of Public Property of The City of Jackson.

Section 7. Employees of the Jackson Transit Authority, to the extent eligible under the provisions of The City of Jackson Retirement Plan, shall have benefits provided therein and shall make the contributions required under the provisions of such plan.

Section 8. The provisions of this ordinance are here declared to be joint and severable and the invalidation of any section, paragraph or phrase of this ordinance shall not invalidate the remaining portions thereof.

Section 9. That this ordinance take effect from and after its adoption, the public welfare requiring it.

_____

Mayor

_____

Commissioner

_____

Commissioner

NOTICE

The foregoing ordinance was introduced at the regular meeting of the Board of Commissioners held April 1, 1966, and will be considered for adoption at the regular meeting of said Board to be held at 10:00 o'clock a.m. in the Board Room at the City Hall on April 5, 1966. All objections or suggested changes will be heard and considered at that time.

This 1st day of April, 1966.

_____

City Recorder

EXHIBIT B

RESOLUTION

Resolution authorizing The Jackson Transit Authority by its Board of Directors to enter into an agreement with T. O. Petty, an individual, to operate and manage the Urban Transportation Facility owned by the City of Jackson.

WHEREAS, The Jackson Transit Authority is charged with the duty and responsibility of operating within the City of Jackson and its environs an "Urban Transit Facility", and

WHEREAS, the Board of Directors of The Jackson Transit Authority deems it advisable and in the public interest to execute an agreement with T. O. Petty for the active management of said transportation facility.

NOW, THEREFORE, BE IT RESOLVED by the Board of Commissioners of The City of Jackson:

1. That the Board of Directors of The Jackson Transit Authority is authorized to execute an agreement with T. O. Petty for his active management of the Urban Transportation Facility owned by The City of Jackson, a copy of said Agreement being attached herewith as Exhibit A to this Resolution and being a part hereof as if specifically included.

2. That this Resolution take effect from and after its adoption, the public welfare requiring it.

_____

Mayor

Attest:

_____

John L. Spain,
City Recorder

EXHIBIT C

AGREEMENT PURSUANT TO SECTION 10(c) OF URBAN MASS TRANSPORTATION ACT OF 1964

JACKSON TRANSIT AUTHORITY (Authority) and LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION (Union), agree that:

1. This agreement shall cover employees of the transit system in and for the City of Jackson, Tennessee, presently owned by the City and operated by the Authority, through a management contract with T. O. Petty, (an individual), who may be affected in the event the Depart-

ment of Housing and Urban Development approves an application for a capital grant (Project) filed by the City under the provisions of the Urban Mass Transportation Act of 1964 (Act). The Project, to be assisted by federal funds in the amount of $231,167, contemplates the purchases of twelve (12) new 35-passenger buses and accessory equipment and construction of a bus maintenance building. The Project facilities will be owned by the City and used by the Authority in providing bus services to replace those of the private operator, Jackson City Lines, Inc., which terminated the prior bus service within the City as of April 2, 1966.

2. This agreement shall apply to such transit system, and shall be binding not only upon the parties hereto, their respective successors in interest, but also upon Mr. T. O. Petty, and any other person, enterprise, body, or agency, whether publicly or privately owned, who shall undertake the management or operation of the transit system, by lease, management contract, or otherwise, during the life of this agreement. Any such party who shall succeed to the interest of the Authority, or otherwise undertake to manage or operate the system, shall assume all of the obligations and liabilities of the Authority with relation to this agreement and comply with and be bound by this agreement in every respect. Any public body or agency so involved shall comply with the requirements of Section 10(c) and shall proceed in such manner as is necessary so as not to reduce or impair any rights, privileges and benefits which such employees of the transit system would have received or be entitled to, had the system continued under its former private management and operation.

3. The Project shall be carried out in such a manner and upon such terms and conditions as will not in any way adversely affect employees of the transit system now or hereafter represented by the Union.

4. All rights, privileges and benefits, (including pension rights and benefits) of employees of the system repre-

sented by the Union and/or employees having already retired, under existing collective bargaining agreements or otherwise, shall be preserved and continued.

5. The collective bargaining rights of employees of the system represented by the Union, including the right to arbitrate any labor dispute, as provided in applicable laws, policies and/or existing collective bargaining agreements, shall be preserved and continued. The Authority agrees that it will bargain collectively with the Union or otherwise arrange for the continuation of collective bargaining, and that it will enter into agreements with the Union or arrange for such agreements to be entered into, relative to all subjects of collective bargaining which are or may be proper subjects of collective bargaining with a private employer.

6. In the case of any labor dispute between the Union and the Authority, the operator of the transit system, or both, that cannot be amicably adjusted by conferences between the parties, the same may be submitted at the written request of either party to a board of arbitration composed of three (3) persons, one to be chosen by the Authority, the operator of the transit system, or jointly by the Authority and the operator of the transit system, as the case may be, one to be chosen by the Union, and the two thus selected to select a third disinterested arbitrator; the findings of the majority of said board of arbitration to be final and binding on the parties thereto.

Each party shall appoint its arbitrator within ten (10) days after notice of submission to arbitration has been given. Should the two arbitrators selected by the parties be unable to agree upon the selection of a third arbitrator within ten (10) days from the date of appointment of the second named arbitrator, then either arbitrator may request the American Arbitration Association to furnish a list of five (5) persons from which the third arbitrator shall be selected. The arbitrators appointed by the parties shall, within five (5) days after the receipt of such list determine by lot the order of elimination and thereafter each shall in

that order alternately eliminate one name until only one name remains. The remaining person on the list shall be the third arbitrator. The term "labor dispute" shall be broadly construed and shall include any controversy concerning wages, salaries, hours, working conditions, or benefits, including health and welfare, sick leave, insurance or pension or retirement provisions, the making or maintaining of collective bargaining agreements, the terms to be included in such agreements, the interpretation or application of such agreements, the adjustment of grievances, any claim, difference or controversy arising out of or by virtue of any of the provisions of this agreement for the protection of employees affected by the Project.

7. The rights, or privileges and benefits contained in the provisions of the Order of the Interstate Commerce Commission in Finance Docket No. 15920, *New Orleans Passenger Terminal Case*, 282 ICC 271, January 16, 1952, will apply to any employee represented by the Union whose position with respect to his employment is worsened as a result of the Project.

8. Employees represented by the Union who are terminated or laid off as a result of the Project shall be granted priority of employment or re-employment to fill any vacant position on the system for which they are, or by training or re-training can become, qualified. In the event training or re-training is required by such employment or re-employment, the Authority shall provide, or provide for, such training or re-training at no cost to the employee, and such employee shall be paid, while training or re-training, the salary or hourly wage of his former job classification or that of the classification for which he is training, whichever is higher.

9. Nothing in this agreement shall be construed as an undertaking by the Union nor the employees represented by the Union, to forego any rights or benefits under any other agreement or under any provision of law.

10. The Authority shall provide or provide for such workmen's compensation insurance, unemployment compensation coverage, and Social Security coverage as shall be required by law. In no event shall these benefits be worsened as a result of the Project.

11. The phrase "as a result of the Project" shall, when used in this agreement, include events occurring in anticipation of, during, and subsequent to the Project.

12. All employees of the transit system represented by the Union on the date of this agreement shall continue to be employed on the system by any successor employer in the management and operation of the system, and the seniority rights of all such employees shall be maintained and continued in accordance with the seniority rosters in effect on the date of acquisition of the system by the successor employer.

13. In the event this Project is approved for assistance under the Act, the foregoing terms and conditions shall be made part of the contract of assistance between the federal government and the applicant for federal funds, provided, however, that this agreement shall not merge into the contract of assistance, but shall be independently binding and enforceable by and upon the parties hereto, in accordance with its terms; nor shall the collective bargaining agreement between the parties merge into this agreement, but each shall be independently binding and enforceable by and upon the parties hereto, in accordance with its terms.

IN WITNESS WHEREOF, the parties hereto have executed this agreement by their respective duly authorized representatives this 26th day of July, 1966.

JACKSON TRANSIT AUTHORITY

By LESTER W. REINKE, President

LOCAL DIVISION 1285,
AMALGAMATED TRANSIT UNION

By DARAL B. CARTER

EXHIBIT D

CONTRACT NO. 1

To April 1, 1969

THIS AGREEMENT, made and entered into the 4th day of April, 1966, by and between T. O. Petty, an individual holding, a Management contract with Jackson Transit authority to operate city transit system for City of Jackson, Tennessee, its successors and assigns, party of the first part, (hereinafter referred to as the "Management") and the Amalgamated Transit Union, Division 1285, of Jackson, Tennessee, party of the second part, (hereinafter referred to as the "Association"), WITNESSETH:

SECTION 1 — The Management fully recognizes the Association and through its properly accredited officers will meet and confer with the properly accredited officers and committees of the Association upon all questions and grievances which may arise under this Agreement.

SECTION 2. — GENERAL — This Agreement shall cover bus operators, garage mechanics, repairmen, wash and grease men, excluding shop foreman and all other personnel. The Association agrees insofar as its membership may permit, at the request of the Management, to provide it with men for the continuous operation of its bus system.

SECTION 3. PROBATIONARY PERIOD — Except as to the wage scale established as provided for in Section 16 hereof, employees of the Management shall not have the benefits of this Agreement during the probationary period of ninety (90) days, for operators, mechanics, wash and grease men, but this shall not prevent the Association from soliciting such probational employees becoming members of the Association upon the understanding that they are not to enjoy, until after expiration of such probationary period, any of the benefits of this Agreement, other than the aforesaid wage scale.

SECTION 4. ARBITRATION — All differences between the parties hereto or between any member of the Association and the Management shall be adjusted as follows: Such differences shall be submitted to, in writing, and discussed with, the Superintendent of the Management, by the officers or committee of the Association and if they cannot agree, then such differences shall be submitted in writing to, and discussed with, the General Manager of the Management, and if they cannot agree, then such differences shall be submitted to, in writing, and discussed with Management. Upon failure to reach a mutually satisfactory adjustment of the question of grievance at issue, the matter or dispute shall be referred to a temporary board of three (3) arbitrators to be selected as follows: The party hereto desiring to place any matter under this Agreement to arbitration shall give the other party thereto notice of such desire in writing, which notice shall state the subject matter to be arbitrated and designate the person selected by the party seeking such arbitration as to its member of said Board. Within five (5) days from the receipt of such notice the adverse party shall, in writing, notify the other of the selection of its member of the Board. The two (2) members of the Board so designated shall select the third member.

In the event the two (2) members of the Board cannot agree upon the third member within a ten (10) day period either party may request the American Arbitration Association to submit a list of five (5) names from which the third member shall be selected. In the event the parties cannot agree on a third member within two (2) days after receiving such list they shall decide by the flip of a coin who strikes the first name and alternately strike until only one (1) name remains and he shall be the third member of the Board. The arbitration shall be completed in no more than sixty days from the beginning unless otherwise mutually agreed to extend this time. In the event the decision has not been rendered in the sixty (60) day period unless agreed to extend the two (2) members of the Board shall request a new list and the same proce-

dures shall be followed. Said Board, upon its completion, shall meet at a place and time agreed upon by a majority of the Board, and their findings shall be submitted in writing to such party hereto. The findings of a majority of the Board shall be binding upon the parties hereto, and the party or parties claiming to be aggrieved. Each party shall bear the expense of its own representative. The expense of the third member, together with any incidental or general expense connected with the arbitration, shall be divided equally between the two parties.

SECTION 5. LEAVE OF ABSENCE — Leave of absence shall be granted to only one employee at the same time for the transaction of either Management or Association business, and such leave shall not affect their seniority rights. If in the opinion of the Management it does not interfere with the service, leave of absence can be granted to more than one.

SECTION 6. All bus operators shall be allowed fifteen (15) minutes per day, time for making up trip reports and settling for their day's work, and getting to points of operation at commencement of shift. Check-in and check-out time is not considered as working time.

SECTION 7. OPPOSED TO OVERTIME — The parties hereto are opposed to, as a matter of principle, overtime work; therefore, overtime shall not be required of employees with regular runs as long as there are available other employees who may be used without being required to work overtime. A regular run shall be a run operated in excess of seven (7) hours daily. Any run less than seven (7) hours daily shall be considered an extra run, and shall be distributed as nearly as possible among the extra men. When the Management requires overtime service from any employee such men shall remain on duty at the expiration of eight and one-half (8½) hours in any one day. It is mutually agreed that on Saturday overtime provision does not apply.

SECTION 7A. All garage mechanics, repair men and helpers, covered by this agreement who work in excess of

their regular eight (8) hours a day, shall be paid at the rate of time and one-half for such overtime.

SECTION 7B — The Management agrees that each employee should have one day off each week for rest and recreation. Therefore, if any employee is required to work on his regular days off, or to perform extra work such as ball games, fairs, shows, etc., after his regular run or day is completed, such employee shall be paid at the rate of time and one-half pay. The extra hour on Saturday night is considered as a part of the regular run.

SECTION 8. REGULAR MEN EXTRA WORK — In case a regular man is required to do extra work in addition to his run, continuous time shall be allowed from first reporting time for said extra work until relieved.

SECTION 9. MINIMUM PAY FOR EXTRA MEN — The average minimum pay for extra men based on not more than two (2) regular days off during the pay period shall be at the rate of:

62 hours for a 16 day period
55 hours for a 15 day period
50 hours for a 14 day period
45 hours for a 13 day period

For each regular day off in excess of two (2) days the rate shall decrease seven (7) hours.

Extra men shall be automatically suspended if they fail to work upon call of the Management unless excused by the Management.

SECTION 10. SENIORITY — Both parties agree to system seniority for all employees covered in this contract. Sign-up to be had at least twice each year, but in the event of any change of any of the runs or anyone leaving the service, a new sign-up will be held within thirty days. Extra men may fill vacancies until new sign-up period. It is agreed that length of service of any employee in the service of the Management shall commence when said

employee was last employed by the Management or its predecessors.

SECTION 11. SENIORITY PROMOTION — If it should become necessary to reduce the force and men are laid off, they are to hold their seniority and if their services are required, they are to be recalled in accordance with their seniority, and no new man shall be employed until all laid-off men are called back.

An employee's seniority shall cease if:

(a) He quits.

(b) He is discharged.

(c) The Management is unable to locate him to notify him to return to work.

(d) He does not notify the Management in three days of his intentions and return to work in seven days after he has been located and notified by registered mail sent to his last known address, which shall constitute notification. This provision may be waived by the Management if reasons given by the men are acceptable to the Management.

SECTION 12. SUSPENSION — Any member of the Association who may be suspended or discharged, for any cause whatsoever, after investigation found not guilty of the offense for which he was suspended, shall be reinstated to his former position and paid amount agreed upon by the Association and Management not to exceed time lost. If carried to the Arbitration Board provided for herein, said amount not to exceed actual time lost.

SECTION 13. There shall be no stoppage of work, concerted cessation or retardation of operations, strikes, or walkouts by any or all members of the Association for any cause whatsoever, and there shall be no lockout by the Management for any cause whatsoever, but nothing herein shall prevent the resignation, suspension or dis-

charge of any Motor Bus Operator for just cause. The Association recognizes that the duties of its members pertain to and are essential to the operation of a public utility and to the welfare of the general public and therefore have agreed under no condition or circumstances will they be called upon or permitted to cease or to abstain from continuous performance of their duties so long as the Management considers the same necessary and the Management likewise will under the terms of the contract, do nothing to prevent such performance of said duties.

The Association and its members agree that they shall at all times perform loyal and efficient service; that they shall be attentive to their duties; will observe all reasonable rules and regulations, will comply with the instructions and directions of their superiors; that they will operate their coaches carefully and with utmost regard at all times for the safety of passengers and the public and themselves; that they will give the passengers courteous consideration and treatment at all times; and that they will use their influence and best endeavors to protect the Management, its property and its interests, and will cooperate with the Management and its other employees in promotion and advancing the welfare and prosperity of the Management at all times. In all matters pertaining to this Agreement, consideration will be given to the primary fact that this is a public service organization and that the safety and good will of the general public, especially patrons of the Management, are of primary importance.

SECTION 14. A DAY'S WORK — An ordinary day's work shall constitute as nearly as reasonably possible eight and one-half (½) hours, and in no event shall any regular run be less than seven (7) hours or more than eight and one-half (8½) hours in any one day.

SECTION 15. VACATIONS — Vacations will be given to all employees under this Agreement according to the following schedule:

One and one quarter (1¼) days for each month accumulative to 22 days.

The rate of pay for these vacations will be the same as an employee would have received on his regular run. Extra men's vacations shall be paid on the basis of eight (8) hours per day. The number of days vacation an employee is entitled to will be determined by the number of months of service he has with the Management each year. Preference for vacation shall be governed by seniority.

SECTION 16. WAGE SCALE — The wage scale for bus drivers covered by the Agreement shall be as follows, effective from and after April 4, 1966:

	April 4, 1966	*Oct. 15, 1966*	*April 1, 1967*	*April 1, 1968*
	Per Hr.	Per Hr.	Per Hr.	Per Hr.
First six months of employment	$1.50	$1.65	$1.75	$1.85
Next six months of employment	1.55	1.70	1.80	1.90
After one year	1.60	1.75	1.85	1.95

The hourly rate of mechanics, wash and grease men, covered by this Agreement shall be as follows:

	April 4, 1966	*Oct. 15, 1966*	*April 1, 1967*	*April 1, 1968*
Garage mechanics and repairmen				
First nine months of employment	$1.60	$1.75	$.185	$1.95
Next nine months	1.65	1.80	1.90	2.00
After eighteen months	1.75	1.90	2.00	2.10
Wash and grease men				
First nine months	$1.30	$1.45	$1.55	$1.65
Next nine months	1.35	1.50	1.60	1.70
After eighteen months	1.40	1.55	1.65	1.75
Night service mechanic				
First nine months	$1.50	$1.65	$1.75	$1.85
Second nine months	1.60	1.75	1.85	1.95
After Eighteen months	1.75	1.90	2.00	2.10

SECTION 17. All operators shall own and have in possession when on duty a dependable watch of standard make. All operators' watches shall be governed by and conform to the Superintendent's. Watches must be checked with the superintendent's watch daily.

SECTION 18. If any motorman, conductor, street car or motor coach operator who reports sick and therefore unfit

for duty, is found to misrepresent the facts, he may be discharged by the Management for misrepresentation.

The Management may discharge any motorman, conductor, street car or motor coach operator who indulges in excessive gambling or drinking and any motorman, conductor, street car or motor coach operator who shall gamble or drink liquor while on duty shall be immediately discharged by the Management.

SECTION 19. All employees returning from the Armed Services will be placed back in the seniority line-up as if they had been working during the time they were in the service, providing it is not in violation of any state or Federal law.

SECTION 20. Every driver is required to keep a minimum of five dollars ($5.00) in change, and ten dollars (10.00) is preferred. This change nor any monies collected for fares during the day shall be used in purchasing incidentals. Each fare, regardless of whether it is a cash fare, ticket, or transfer, must be registered individually and at the time of collection. There is to be no figuring nor balancing by an employee. All of this is taken care of by the register. A driver knows how much change he started with, and he should take this from his changer at the end of his day's work, turning the remainder in to the Management. A driver who is continually short and over is either dishonest or is not taking the interest in his job that he should. In either case, this type of employee is not desirable. Before dismissing such an employee, the Management will call him into the office, go over his fare registrations record and give him an opportunity to do the job right.

SECTION 21. The Association and the Management agree that their interest and welfare depend directly upon the earnings of the Management, and that the conduct of each motor coach operator is a vital factor in securing the maximum amount of motor coach revenue at a minimum expense. The Association agrees that the Management has

the full right to promulgate and prescribe reasonable rules and regulations governing motor coach operations and operators of motor coaches and to discharge or discipline motor coach operators for just cause. The Association also agrees that its members will carry out to the best ability the full intent of such rules and regulations so that the motor coach service will be continually improved and so a sincere desire on the part of present and prospective patrons to ride the motor coaches will be maintained and created. The Management will have the exclusive right to determine the number of employees it may employ and retains full right, power and authority of management.

SECTION 22. UNIFORMS — Uniforms will be furnished each bus driver. New drivers will receive their issue after comoletion of probation period.

Uniforms will consist of two summer pants, two short sleeve shirts, one cap with badge, two winter pants, two long sleeve shirts and one jacket.

These uniforms will remain the property of Jackson Transit Authority but will be maintained by the driver.

Each driver will be required to report for duty in a full presentable uniform.

Uniforms are not to be worn while off duty. Any damages to uniforms will be the drivers responsibility.

On leaving the employment of the Management uniforms will be turned in. Items not turned in will be paid for by the employee.

SECTION 23. SICK LEAVE — Each employee shall be entitled to one and one quarter (1¼) days per month sick leave accumulative to seventy-five (75) days. The sick leave shall commence on the first day in case of illness or injury and the Management may require a doctor's certificate after the second day of illness.

SECTION 24. WORK WEEK — Beginning on January 1, 1967, all employees will work an alternate six (6) days one week and five (5) days the following week.

Beginning on January 1, 1968 all employees shall work a five day work week.

This section can be amended during this agreement by mutual agreement.

SECTION 25. TERMS OF CONTRACT — This contract and all of its terms and conditions shall be in full force and effect for the period April 4, 1966 thru March 31, 1969. Unless terminated, it shall continue thereafter from year to year. Either party may terminate this Agreement by giving sixty (60) days notice to the other party in writing of his desire so to terminate, but in any case the termination date shall not occur before April 1, 1969. Should any Section be found in violation, such Section or Sections shall be void but shall not change any other section of this contract.

Notice of termination by the Association shall be sent by registered mail to Mr. T. O. Petty or his successor. Notice of termination by the Management shall be sent by registered mail to the business agent of Division 1285, Jackson, Tennessee. In the event of change of address of business agent, notification by registered mail shall be given to the Management.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement this ____ day of June, 1966.

JACKSON TRANSIT AUTHORITY
MANAGEMENT
By T. O. PETTY
Management

AMALGAMATED TRANSIT UNION
DIVISION 1285
By JOHN A. WRIGHT
President
By DOYAL B. CARTER
Secretary-Treasurer

EXHIBIT E

CONTRACT NO. 4

April 1, 1975 to April 1, 1978

This agreement, made and entered into the 1st day of April, 1975, by and between T. O. Petty, an individual holding a Management contract with Jackson Transit Authority to operate City Transit System for the City of Jackson, Tennessee, its successors and assigns, party of the first part, (hereinafter referred to as the Management) and the Amalgamated Transit Union, Division 1285 of Jackson, Tennessee, party of the second part, (hereinafter referred to as the union).

WITNESSETH:

That the parties hereto contract and agree as follows:

GENERAL PROVISIONS:

Article i

Section 1 — Recognition — The Management fully recognizes the union as the exclusive bargaining agency for all its employees who are covered by this agreement for the purpose of collective bargaining with respect to wages, pensions, health and welfare plans, hours and working conditions. The Management agrees through its properly accredited officers to meet and confer with the properly accredited officers and committees of the union upon all conditions and grievances which may arise under this agreement.

Section 2 — This agreement shall cover bus operators, garage mechanics, repairmen, wash and grease men, excluding shop foremen and all other personnel. The union agrees insofar as its membership may permit, at the request of the Management, to provide it with men for the continuous operation of its bus system.

Section 3 — Probationary Period — Except as to the wage scale established as provided for in section 9, article 2, and section , article 3, hereof, employees of the

Management shall not have the benefits of this agreement during the probationary period of sixty (60) days, for operators, mechanics, repairmen, wash and grease men, but this shall not prevent the union from soliciting such probational employees to become members of the union upon the understanding that they are not to enjoy, until after expiration of such probationary period, any of the benefits of this agreement, other than the aforesaid wage scale.

Section 4 — Membership in Union — All employees of the Management covered by this agreement shall be members in good standing during the union and shall remain members in good standing in the union and shall remain members in good standing during the life of this agreement, if they remain in the service of the Management.

The provisions of the foregoing paragraph, inspecting joining and remaining members of the union shall be null and void while there is in force any State or Federal Law declaring any such provisions invalid.

Section 5 — Arbitration Procedure — All differences between the parties hereto or between any member of the union and the Management shall be adjusted as follows: Such differences shall be submitted to, in writing, and discussed with the Management, by the officers or committee of the union and if they cannot agree, then such differences shall be submitted in writing to and discussed with the General Manager of the Management, and if they cannot agree, then such differences shall be submitted to, in writing, and discussed with the Management. Upon failure to reach a mutually satisfactory adjustment of the question or grievance at issue, the matter or dispute shall be referred to a temporary board of three (3) arbitrators to be selected as follows: The party hereto desiring to place any matter under this agreement to arbitration shall give the other party thereto notice of such desire in writing, which notice shall state the subject matter to be arbitrated and designate the person selected by the party seeking such arbitration as to its member of said board. Within

five (5) days from the receipt of such notice the adverse party shall, in writing, notify the other of the selection of its member of the Board. The two (2) members of the Board so designated shall select the third member.

In the event the two (2) members of the Board cannot agree upon the third member within a ten-day period either party may request the American Arbitration Association to submit a list of five (5) names from which the third member shall be selected. In the event the parties cannot agree on a third member within the two (2) days after receiving such list they shall decide by the flip of a coin who strikes the first name and alternately strike until only one (1) name remains and he shall be the third member of the Board. The Arbitration shall be completed in no more than sixty days from the beginning unless otherwise mutually agreed to extend this time. In the event the decision has not been rendered in the sixty day period unless agreed to extend the two members of the Board shall request a new list and the same procedures shall be followed. Said Board, upon its completion, shall meet at a place and time agreed upon by a majority of the Board, and their findings shall be submitted, in writing, to such party hereto. The findings of a majority of the Board shall be binding upon the parties hereto, and the party or parties claiming to be aggrieved. Each party shall bear the expense of its own representative. The expense of the third member, together with any incidental or general expense connected with the arbitration, shall be divided equally between the two parties.

Section 6 — Leave of Absence — Leave of absence shall be granted for the transaction of business of either the Company or the union and such leave shall not affect seniority rights, seniority shall continue to accumulate during the period covered by the leave of absence.

Section 7 — Free Transportation — Free transportation on all lines and on all types of passenger service of the Management shall be granted to all employees covered by this agreement.

Section 8 — Suspension — Any member of the union who may be suspended or discharged, for any cause whatsoever, after investigation, found not guilty of the offense for which he was suspended, shall be reinstated to his former position and paid amount agreed upon by the union and the Management, not to exceed time lost. If carried to the Arbitration Board provided for herein, said amount not to exceed actual time lost.

Section 9 — Strikes and Lockout — There shall be no stoppage of work, concerted cessation or retardation of operations, strikes, or walkouts by any or all members of the union for any cause whatsoever, and there shall be no lockout by the Management for any cause whatsoever, but nothing herein shall prevent the resignation, suspension or discharge of any Motor Bus Operator for just cause. The union recognizes that the duties of its members pertain to and are essential to the operation of a public utility and to the welfare of the general public and therefore have agreed under no condition or circumstances will they be called upon or permitted to cease or abstain from continuous performance of their duties so long as the Management considers the same necessary and the Management likewise will under the terms of the contract, do nothing to prevent such performance of said duties.

The union and its members agree that they shall at all times perform loyal and efficient service; that they shall be attentive to their duties; will observe all reasonable rules and regulations, will comply with the instructions and directions of their superiors; that they will operate their coaches carefully and with utmost regard at all times for the safety of passengers and the public and themselves; that they will give the passengers courteous consideration and treatment at all times; and that they will use their influence and best endeavors to protect the Management, its property and its interests, and will cooperate with the management and its other employees in promotion and advancing the welfare and prosperity of the Management at all times. In all matters pertaining to this agreement, consideration will be given to the primary fact that this is

a public service organization and that the safety and good will of the general public, especially patrons of the Management, are of primary importance.

Section 10 — Layoff and Recall — When in the conduct of the Managements' business it becomes necessary to reduce the force and men are laid off they shall be laid off according to seniority, and if their services are again required they are to be recalled in accordance with their seniority. Employees are to hold seniority while they are laid off. No new employees shall be employed until all laid off men are called back to work. Notification to the person to be called back to work shall be by certified or registered mail to his last known address and a copy of such notice shall be sent to the union.

An employee's seniority shall cease if:

(a) He quits.

(b) He is discharged and the discharge is upheld.

(c) The Management is unable to locate employee to notify him to return to work.

(d) Employee does not notify the Management in seven

(7) days of his intentions and return to work in fifteen (15) days after he has been located and notified by registered mail sent to his last known address, which shall constitute notification. This provision may be waived (as to time limit) if reasons given are acceptable to union and Management.

Section 11 — Check-Off — The Management agrees to honor voluntary individual check off request signed by employees covered by this agreement authorizing the Management to deduct the employees monthly union dues, initiation fees and assessments in accordance with the terms and provisions of such signed authorization.

Such dues, initiation fees or assessments shall be deducted from the first pay check of the month. The

Management agrees to remit the amount of dues, initiation fees and assessments so deducted to the designated representative of the union.

Section 12 — Holidays and Holiday Pay

(a) The following will be observed as paid holidays: New Year's Day, July 4th, Labor Day, Thanksgiving Day, Christmas Day and Employee's Birthday. The Management shall designate the day to be observed when one of the foregoing holidays (except employee's birthday) fall on Sunday, should a day other than Sunday be observed as the holiday.

(b) Prior to each holiday (except employee's Birthday) there shall be a holiday sign-up (if anyone works on the holiday) for all operators who would work on such day were it not observed as a holiday, at which time such employees shall sign up according to seniority to work or to be off, to the extent possible on such holiday.

(c) Prior to each holiday (except employee's Birthday) there shall be a holiday sign-up (if anyone works on the holiday) in the Maintenance Department and all employees who would work on such day were it not observed as a holiday shall sign-up according to seniority to work or to be off to the extent possible on such holiday.

(d) An employee who does not work on the observed holiday for any reason shall be paid the amount he would have earned on his regular run or shift had the day not been observed as a holiday, with such pay for regular operators to be not less than eight hours and fifteen minutes (8:15) per day and for extra operators and all other employees not less than eight (8) hours per day. Any employee who is off sick, on vacation, or whose day off falls on the observed holiday shall be paid for eight hours and fifteen minutes (8:15) for operators and eight (8) hours for maintenance employees.

(e) An employee who works on the observed holiday will be paid at the rate of time and one half (1½) for all hours worked on the holiday and in addition will be paid the amount he would have earned on his regular run or shift had the day not been observed as a holiday, with total holiday pay for an operator who works on the holiday to be not less than twenty (20) hours and fifteen (15) minutes and total holiday pay for other employees who work on the holiday to be not less than twenty (20) hours.

(f) If an employee's birthday falls on a day he is regularly scheduled to work he will be off that day with pay. The pay shall be the amount he would have earned on his regular run or shift had the day not been his birthday holiday with pay to be not less than eight hours and fifteen minutes (8:15) for operators and not less than eight (8) hours for maintenance employees. If an employee's birthday holiday falls on another paid holiday under this Contract he will be paid for two holidays with the pay to be not less than sixteen hours and thirty minutes (16:30) for operators and sixteen hours (16) for maintenance employees.

Section 13 — Vacations — Vacations will be given to all employees under this agreement according to the following schedule:

New employees will be given ten (10) days vacation with pay the first year of employment.

Employees will be given eighteen (18) days vacation with pay the second year of employment.

Employees will be given twenty-four (24) days vacation with pay the eighth (8) year of employment.

Employees will be given thirty-one (31) days vacation with pay the twentieth (20th) year of employment.

Vacation list will be posted prior to April 1, of each year. Employees shall sign up for vacations in accordance with

their seniority. Any employee eligible for more than one week of vacation may take their second, third, fourth and fifth weeks, during the vacation period not necessarily consecutive, insofar as their seniority may permit. The vacation pay for these vacations will be the same as an employee would have received on his regular run during his vacation period. Extra men's vacation pay shall be based on eight hours per day. Maintenance employees vacation pay shall be based on eight hours per day at their regular rate of pay per hour.

Section 14 — Jury Duty Pay — When any employee covered by this agreement is called and serves on the jury in Madison County Courts or Federal Courts or Courts in the County in which the employee resides, the Management agrees to pay the difference between the payment made by the County or Federal Court for jury duty and that time which would have been paid for his regular run or work day; provided the pay shall not be less than eight hours and fifteen minutes for operators and eight hours for other employees.

Section 15 — Funeral Leave — Each employee will be given three (3) scheduled work days off with pay in the event of death of his spouse, children, parents, brother, sister, parents of employee's spouse. Pay shall be the amount he would have earned on his regularly scheduled run or job had he worked the first three (3) full scheduled work days on which he does not work, within the first five (5) days after one of the above mentioned deaths.

Section 16 — Sick Leave — Each employee shall be entitled to one and one quarter (1¼) days per month sick leave with pay, accumulative to seventy-five (75) days. Sick leave shall commence on the first day in case of illness or injury and the Management may require a doctor's certificate after the second day of illness.

Any employee who retires, resigns or leaves the service of the Company for any reason shall be paid for all unused accumulated sick leave days at his regular rate.

Section 17 — Hazard Insurance — The Management will obtain and pay the yearly premiums for Hazard Insurance on all employees providing coverage not to exceed $50,000 for loss of life or for certain permanent injuries sustained by an employee while on duty and as a result of felonious attack, such coverage to be with Union Labor Life Insurance Company, Policy Number C2881, issued to the Amalgamated Transit Union.

Section 18 — Group Insurance All Employees The Company agrees to secure Group Insurance Coverage with Blue Cross-Blue Shield with room and board to be not less than semi-private and the rest of the hospitalization coverage to be not less than the benefits under the Policy Number 04048.

The Company agrees to pay 50% of the total Group Insurance premium each month effective April 1, 1975 for each employee and dependents.

Effective April 1, 1976, the Company agrees to pay 75% of the total Group Insurance premium each month for each employee and dependents.

Effective April 1, 1977, the Company agrees to pay 100% of the total Group Insurance premium each month for each employee and dependents.

The above described Group Insurance is hereby incorporated by reference and made a part of this agreement.

Section 19 — Cost of Living Clause

The basic wage rates as stated herein shall be subject to adjustments in accordance with changes, if any, in the cost of living from February 15, 1975, as reflected by the Consumer Price Index (US City average all items — series A 1957-1959=100) published by the Bureau of Labor Statistics, U.S. Department of Labor. The index for February 15, 1975, shall be the base index. For each increase, if any, in that index of .4 of one point between February 15, 1975 and May 15, 1975, all employees shall

be paid one cent per hour. This adjustment shall be payable the first payroll period after May 15, 1975 index is published but not later than July 1, 1975, and shall be paid for the next following three month period. Quarter annual adjustments shall be made thereafter in the same manner. Thus the next cost of living adjustment shall be determined by the increase, if any, in the Consumer Price Index from February 15, 1975 to August 15, 1975, and shall be payable the payroll period after the August 15, 1975 index is published, but not later than October 1, 1975, etc.

The foregoing cost of living adjustments may result in an increase or decrease in the then existing cost of living increment, but shall in no event result in a reduction in the basic wage rates established herein.

Article 2

Provisions Affecting Operators Only

Section 1 — Seniority Operators — It is agreed that seniority for all purposes which seniority is used shall be as follows: The length of service of all operators in the service of the Mangement shall commence when said operator was last employed by the Management or its predecessors.

Section 2 — Work Week Operators — Effective June 1, 1972, the operators will work a five (5) day work week. Each operator shall have two (2) days off each calendar week to be selected by system seniority.

Section 3 — A Days Work and Overtime Operators

(a) A days work shall consist as nearly as reasonably possible of eight hours and thirty minutes (8:30) and in no event shall any regular run pay less than eight (8) hours. A regular run for all purposes shall be considered as at least eight (8) hours worked.

(b) The parties are opposed as a matter of principle to overtime work and overtime work shall not be required of

employees with regular runs so long as there are available other operators who may be used without being required to work overtime.

(c) In case a regular man is asked to do extra work in addition to his regular run, and he does the extra work, continuous time shall be allowed from first reporting time for said extra work until relieved.

(d) Time and one half (1½) shall be paid for the following conditions:

(1) All work on operator's day off.

(2) All work over 8 hours each day.

(3) All work after completion of regular run.

Section 4 — Report Time — All bus operators shall be allowed fifteen (15) minutes per day (in addition to run or other work) time for making up trip reports and getting to points of operation at commencement of shift.

Section 5 — Minimum Guarantee for Extra Operators

The minimum pay for extra operators shall be seventy (70) hours each semi-monthly pay period, provided however, that any day on which an extra operator does not show up for work seven (7) hours for each such day will be deducted from the seventy (70) semi-monthly guarantee, excluding his regular days off each pay period.

Section 6 — System Sign-up for Runs or Extra Board

(a) There will be at least two (2) system sign-ups each year, but in the event of any change of any change of any of the runs or anyone leaves the service, a new system sign-up will be held within thirty (30) days. Extra men may fill vacancies until new sign-up period.

(b) Operators shall be allowed to sign up on regular runs or sign on extra board so far as seniority will permit. All above selections (run or extra board) shall be made in accordance with system seniority.

Section 7 — Uniforms Operators — Uniforms will be furnished by the Management to each bus driver. New drivers will receive their issue after completion of probation period.

Uniforms will consist of two (2) pair of summer pants, two (2) short sleeve shirts, two (2) pair of winter pants, two (2) long sleeve shirts, one cap with badge and one lined jacket. Each driver will be required to report for duty in presentable uniform. Operators may wear short sleeve shirts and no tie in spring and summer months (time to be agreed by Management and Union). An operator will have to wear tie when wearing a long sleeve shirt.

Section 8 — Operators Change Fund — Each operator will be issued $25.00 by the Management, to be used as running change. Some operators are issued $50.00. This money is not to be used for personal purposes. It is to be in the operator's possession while on duty. The money is subject to check by the Management at any time. Money is to be turned in by the operator on leaving the employment of the Management.

Section 9 — Wage Rates Operators

The regular straight time hourly rates for operators shall be as follows:

Period of Service	*April 1, 1975*	*April 1, 1976*	*April 1, 1977*
1st six months	$4.55 per hour	$4.90 per hour	$5.30 per hour
2nd six months	$4.65 per hour	$5.00 per hour	$5.40 per hour
After one year	$4.75 per hour	$5.10 per hour	$5.50 per hour

Section 10 — Minimum Pay Provisions

(a) Each operator shall be paid a minimum of four (4) hours at the applicable rate when working on his day off.

(b) Each operator will be paid a minimum of two (2) hours for each report made on his regular day to work at the applicable rate.

(c) All charters shall pay a minimum of three (3) hours at the applicable rate.

Article 3

Provisions Affecting Maintenance Employees Only

Section 1 — Seniority Maintenance Employees — It is agreed that seniority for all purposes which seniority is used shall be as follows: The length of service of all maintenance employees in the service of the Management shall commence when said maintenance employees were last employed by the Management or its predecessors.

Section 2 — Work Week Maintenance Employees — The maintenance employees shall work a five (5) day work week. Each maintenance employee shall have two (2) consecutive days off each calendar week to be selected by seniority.

Section 3 — Days Work and Overtime Maintenance Employees

All maintenance employees shall work eight (8) hours each day. Time and one half (1½) shall be paid for all time worked in excess of eight (8) hours each day. Time and one half shall be paid all maintenance employees for all time worked on their days off.

Section 4 — Minimum Pay Provisions

(a) Each maintenance employee shall be paid a minimum of four (4) hours at the applicable rate when working on his day off.

(b) Each maintenance employee shall be paid a minimum of two (2) hours at the applicable rate when asked to work before or after his regular shift on his regular day to work.

Section 5 — Uniforms Maintenance Employees

Management agrees to furnish uniforms and laundry for at least three changes (shirt and pants) each week (to each employee) (This is rental uniforms).

Section 6 — Work Sign-ups, etc.

There will be at least two (2) system sign-ups each year. Maintenance employees shall be allowed to sign-up for their work shift in accordance with their seniority in their respective classification.

Section 7 — Tools — Management agrees to furnish the necessary special and heavy duty tools for maintenance employees to maintain and service the buses and equipment.

Section 8 — Wage Rates Maintenance Employees

The regular straight time hourly rates for maintenance employees shall be as follows:

Classification	*April 1, 1975*	*April 1, 1976*	*April 1, 1977*
Head Mechanic	$4.90 per hour	$5.25 per hour	$5.65 per hour
Assistant Mechanic	$4.75 per hour	$5.10 per hour	$5.50 per hour
Wash and Grease Men	$4.15 per hour	$4.50 per hour	$4.90 per hour

Article 4

Section 1 — Term of Agreement: This Contract and all of its terms and conditions shall be in full force and effect for the period April 1, 1975, through March 31, 1978. Unless terminated, it shall continue thereafter from year to year. Either party may terminate this agreement by giving sixty (60) days notice to the other party, in writing, of his desire so to terminate, but in any case the termination date shall not occur before April 1, 1978. Should any section be found in violation, such section or sections shall be void but shall not change any other section of this contract.

In Witness whereof, the parties hereto have executed this Agreement this the 17th day of June 1975.

JACKSON TRANSIT AUTHORITY

By T. O. PETTY
Management

AMALGAMATED TRANSIT UNION
DIVISION 12

By LEE ROY RIMKES, Pres.

By SIDNEY WILSON SPRAGIN

EXHIBIT F

Wallace 12-27-75

JACKSON TRANSIT AUTHORITY

241 East Deaderick, Post Office Box 102,
Jackson, Tennessee 38301

December 23, 1975

Mr. Lee Roy Rinks
122 Peabody Avenue
Jackson, Tennessee 38301

Dear Mr. Rinks:

As we mentioned to you on the telephone last week, the City Attorney assigned to work with the Jackson Transit Authority has given us an opinion that no contractual relationship exists between the Jackson Transit Authority and the Amalgamated Transit Union. We are enclosing for you a copy of that opinion. We are also enclosing a copy of the most recent city audit of the Jackson Transit Authority. This audit discloses the substantial deficits that the Authority has incurred recently.

As you know, the Authority was recently reorganized and the new Board is attempting to salvage the mass transit system in Jackson. In view of the fact that no contractual

relationship exists, the Authority Board hereby notifies you that the cost of living escalator in the contract signed April 1, 1975, by T. O. Petty will not be honored and that wage rates currently in effect will be frozen until such time as we can meet with you and any other parties you desire to discuss the entire situation. We are quite willing to sit down and discuss this matter with you or any other representative of the employees, but until such time as a complete discussion is held the wages and fringe benefits currently existing will not be changed.

Because several parties have advised us that Mr. Raymond C. Wallace of Memphis is an international official of your Union and is concerned with this matter, we are sending him a copy of this letter. We would appreciate it if you would get in touch with us or have someone from your Union get in touch with us so we can mutually agree on a satisfactory meeting date. We will need several weeks advance notice of this date to arrange our schedules so that the Board may meet with you. We look forward to hearing from you.

Sincerely yours,

Evan Davis
President
Jackson Transit Authority

ED:sm

Enclosures

cc: Mr. Raymond C. Wallace
545 Thorn Ridge Cove
Memphis, Tennessee

All JTA Board Members

Law Offices

SPRAGINS & MURCHISON

Elks Building
P.O. Box 2004
Jackson, Tennessee 38301
901/424-0461

December 9, 1975

Mr. Evan Davis, Chairman
Jackson Transit Authority
c/o National Bank of Commerce
P. O. Box 189
Jackson, Tennessee 38301

Dear Mr. Davis:

In your capacity as Chairman of the Jackson Transit Authority ("JTA") you have requested an opinion from me as Assistant City attorney on whether or not there exists any contractual relationship between JTA and Amalgamated Transit Union, Division 1285, of Jackson, Tennessee (the "Union").

In studying this matter I have reviewed the Ordinance of the City of Jackson which creates and establishes the JTA; the Management Agreement dated July 5, 1966 between JTA and T. O. Petty, an individual; and an agreement dated April 1, 1975 between the said T. O. Petty and the Union. You have advised me that Mr. Petty has resigned as Manager of JTA and that the aforesaid Management Contract between JTA and Mr. Petty has been terminated.

Based upon all of the foregoing it is my opinion that JTA does not have any contractual relationship with the Union. The rights and duties created by the agreement dated April 1, 1975 between Mr. Petty and the Union are binding only on the parties to that agreement and since Mr. Petty is no longer Manager of JTA, his agreement with the Union is without effect insofar as JTA is concerned. I am further of the opinion that, even if the

agreement between Mr. Petty and the Union should be construed in some way to bind JTA, the agreement would be ultra vires and void for the reason that it creates an obligation in excess of $5,000.00 without prior approval of the Board of Commissioners of the City of Jackson in violation of Section 3 of the Ordinance which created JTA.

Please feel free to call on me if you have any other questions.

Yours very truly,

SIDNEY W. SPRAGINS

SWS:FT

In the United States District Court for The Western District of Tennessee Eastern Division

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Civil Action No. 76-104E

Local Division 1285, Amalgamated Transit Union AFL/CIO/CLC,

Plaintiff,

vs.

Jackson Transit Authority, The City of Jackson, William T. Coleman, Jr., Secretary of Transportation, and William J. Usery, Secretary of Labor, United States Department of Labor,

Defendants.

MOTION TO DISMISS COMPLAINT

Filed 9/29/76

Defendants Jackson Transit Authority and The City of Jackson move the Court to dismiss this action as to them upon the ground that the Court lacks jurisdiction of the

subject matter of the Plaintiff's claim against them because it appears on the face of the Complaint that

(a) Plaintiff's claim against them does not arise under the Constitution, laws or treaties of the United States; and

(b) this is not a proper case for the application of the Doctrine of Pendent Jurisdiction because

(i) the Plaintiff's claim against Co-Defendants William T. Coleman, Jr., Secretary of Transportation, and William J. Usery, Secretary of Labor, is without substance; and

(ii) the cause of action alleged in the Complaint against the Co-Defendants William T. Coleman, Jr., and William J. Usery, is completely separate and distinct from the cause of action alleged against the Defendants Jackson Transit Authority and the City of Jackson.

Respectfully submitted,

JACKSON TRANSIT AUTHORITY AND
THE CITY OF JACKSON

By SIDNEY W. SPRAGINS

Assistant City Attorney
P. O. Box 2004
Elks Building
Jackson, Tennessee 38301

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served a true copy of the foregoing on counsel for all parties by making or delivering the same to the last known address of such counsel.

This the 29th day of Sept., 1976.

SIDNEY W. SPRAGINS

In The United States District Court for The Western District of Tennessee Eastern Division

Civil Action No. 76-104E

Local Division of 1285, Amalgamated Transit Union AFL/CIO/CLC,

Plaintiff,

vs.

Jackson Transit Authority, the City of Jackson, William T. Coleman, Jr., Secretary of Transportation, and William J. Usery, Secretary of Labor, United States Department of Labor,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BY JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON

Filed 9/29/76

I. *THE CASE.*

The substance of the Complaint in this case is that

1. The Jackson Transit Authority (the "JTA") as an agency of the City of Jackson, Tennessee (the "City") for the operation of a public transportation system entered into an agreement with plaintiff in 1966 (the "13(c) Agreement") as a condition of the receipt of federal funds under the Urban Mass Transportation Act of 1964 (the "UMTA"); that under the terms of the 13(c) Agreement, the JTA agreed, among other things, to bargain collectively with the plaintiff; and that the JTA, through its managing agent, entered into collective bargaining agreements with the plaintiff, the most recent of which had an

effective date of April 1, 1975, and an expiration date of April 1, 1978 (the "Labor Agreement").

2. The JTA and the City have breached both the 13(c) Agreement and the Labor Agreement in one or more particulars.

3. The defendant William J. Usery, Secretary of Labor, has failed to exercise his statutory duty to determine that JTA and the City have violated the 13(c) Agreement and has failed to take steps necessary to insure compliance with said Agreement as he allegedly is required to do by the provisions of the UMTA.

4. The defendant William T. Coleman, Jr., Secretary of Transportation, has failed to enforce the terms of the 13(c) Agreement as he allegedly is required to do by the UMTA.

II. *JURISDICTION.*

Jurisdiction of this Court is predicated on 28 U.S.C.A. § 1331(a) (Federal Question); § 1337 (Regulation of Commerce); § 1361 (Mandamus of Federal Officer); 49 U.S.C.A. § 1601 et seq. (UMTA); and the Doctrine of Pendent Jurisdiction.

1. *Federal Question.* Plaintiff's claim against JTA and the City is that they have breached the 13(c) Agreement and the Labor Agreement. Such claim does not arise under the Constitution or any law of the United States and is purely local in nature. U.S. District Courts are without jurisdiction of a cause of action for breach of contract not arising under Federal law in the absence of diversity of citizenship between the parties. *Block v. Plaut,* (D.C. Ill. 1949) 87 F. Supp. 49. The fact that the 13(c) Agreement was the outgrowth of requirements of the Secretary of Transportation under the UMTA does not change the local character of the plaintiff's claim for its breach. See *Ivy Broadcasting Co. v. American Tel. & Tel. Co.* (C.A.N.Y. 1968) 391 F.2d 486. The Complaint does not allege that the JTA or the City has violated any provision of the UMTA. In fact, the Complaint on its face shows that the

provisions of the UMTA and the requirements of the Secretary of Transportation were complied with by the execution of the 13(c) Agreement. Therefore, there is no Federal Question jurisdiction in this case as between the plaintiff and the JTA and the City.

2. *Regulation of Commerce.* The jurisdiction conferred upon U.S. District Courts by the Labor-Management Relations Act of 1947 to hear suits for violation of contracts between an employer and a labor organization affecting commerce (29 U.S.C.A. § 185(a)) is inapplicable in this case. The JTA and the City, as political subdivisions of the State of Tennessee, are specifically excluded from the definition of "employer" and are not subject to the provisions of the Act. 29 U.S.C.A. § 152(2).

3. *Mandamus of Federal Officer.* Section 1361 obviously has no application to JTA and the City.

4. *UMTA.* The provisions of the UMTA create no right of action for a violation thereof; and, as indicated above, the Complaint does not allege that the JTA and the City have violated any provision of the Act.

5. *Pendent Jurisdiction.* Plaintiff clearly relies upon the Doctrine of Pendent Jurisdiction in respect of its claim against the JTA and the City. The authorities are unaminous that pendent jurisdiction of a non-federal claim attaches only where the plaintiff's federal claim is (i) substantial, and (ii) the non-federal claim does not constitute a separate and distinct cause of action. See Anno. *Modern Status of Rules as to Pendent Federal Jurisdiction over Non-Federal Claims,* 5 A.L.R.3d 1040, et seq.

(a) *Substantiality of Federal Claim.* Whether a federal claim is "substantial" is to be determined on the basis of pleadings, not upon evidence which may ultimately be introduced at trial. *A. H. Emery Co. v. Marcan Products Corp.* (D.C.N.Y.) 268 F. Supp. 289, affd. (C.A.2) 389 F.2d 11. A substantial federal claim refers to a cause of action which would withstand a Motion to Dismiss for failure to state a claim. *Edward J. Moriarty & Co. v. General Tire &*

Rubber Co. (D.C. Ohio) 289 F. Supp. 381, *Denys Fisher (Spirograph) Ltd. v. Louis Marx & Co.* (D.C. Va.) 306 F. Supp. 956.

The federal claim relied upon by the plaintiff in this case to support pendent jurisdiction over the JTA and the City is that the codefendants Secretary of Transportation and Secretary of Labor have failed in their alleged responsibilities under the UMTA, specifically 49 U.S.C.A. § 1609. Defendants JTA and the City take the position that § 1609 imposes no obligation upon either the Secretary of Labor or the Secretary of Transportation to enforce the 13(c) Agreement, but that even if it did, determinations by the respective Secretaries would not be subject to the review of this Court under the authority of *Kendler v. Wirtz* (C.A. 3, 1968) 388 F.2d 381, and *Congress of Railway Unions v. Hodgson* (D.C. Dist. of Col., 1971) 326 F. Supp. 68. As to the substantiality of plaintiff's federal claim, JTA and the City further rely upon the Points and Authorities referred to in the Memorandum filed or to be filed in this cause on behalf of the co-defendants William T. Coleman, Jr. and William J. Usery, in support of their respective Motions to Dismiss this action as to them.

The JTA and the City insist that the federal claim relied upon by the plaintiff is not substantial, and, therefore, fails to meet the first test for the application of the Doctrine of Pendent Jurisdiction.

(b) *Singleness of Cause of Action.* The exercise of jurisdiction over a non-federal claim under the Doctrine of Pendent Jurisdiction requires that both the federal and non-federal claim constitute a single cause of action. The leading case of *Hurn v. Oursler* (1933) 289 U.S. 238, 77 L. Ed. 1148 53 S. Ct. 586, distinguished between separate "causes of action" on the one side and "grounds in support of a single cause of action" on the other. The Court said:

> "But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the

> same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, only one of which presents a federal question, and a case where two separate and distinct causes of action are alleged, only one of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal ground; in the latter it may not do so upon the non-federal cause of action."

The test of singleness of cause of action has been held not to be met where the federal claim was distinct from the non-federal claim in terms of the nature of the claims, the type of relief sought, and the evidence necessary to support them. *Moynahan v. Pari-Mutuel Employees Guild* (1963 C.A. 9 Cal.) 317 F.2d 209, cert. den. 375 U.S. 911, 11 L. Ed. 2d 150, 84 S. Ct. 207.

The cases following *Hurn v. Oursler, supra*, are clear that the requirement of a single cause of action is not met where the defendant against whom a federal claim is asserted is separate from and unrelated to the defendant against whom the non-federal claim is asserted. Thus, both the federal and non-federal claims must be asserted against the same party. *Barrows v. Faulkner* (D.C. Okla.) 327 F. Supp. 1190; *Letmate v. Baltimore and Ohio Railroad* (D.C. Md.) 311 F. Supp. 1059; *Tucker v. Shaw* (D.C. N.Y.) 308 F. Supp. 1; *Lawes v. Nutter* (D.C. Tex.) 292 F. Supp. 890; *Payne v. Mertens* (D.C. Cal.) 343 F. Supp. 1355; *Kaufman v. Union P.R. Co.* (D.C. Cal.) 351 F. Supp. 392; *Howmet Corporation v. Tokyo Shipping Co.* (D.C. Del.) 320 F. Supp. 975.

The federal claim relied upon by the plaintiff to support the pendent jurisdiction over the JTA and the City is that the respective Secretaries of Transportation and Labor have failed to discharge their alleged responsibilities under the UMTA, and the Court is asked to order them to perform those duties. The claim against the JTA and the

City for breach of the 13(c) Agreement and the Labor Agreement, however, is entirely separate and distinct in terms of the nature of the claims, the type of relief sought and the evidence necessary to support them. More importantly, however, is the absence of identity between the parties against whom the federal and non-federal claims are asserted. The respective Secretaries of Transportation and Labor are entirely separate and distinct and totally unrelated to the defendants JTA and the City of Jackson.

CONCLUSION

Defendants JTA and the City of Jackson respectfully submit that, for the reasons hereinabove stated, the Motion to Dismiss filed in this cause on their behalf should be sustained for lack of jurisdiction over the subject matter.

Respectfully submitted,

SIDNEY W. SPRAGINS
Assistant City Attorney
P. O. Box 2004
Elks Building
Jackson, Tennessee 38301

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served a true copy of the foregoing on counsel for all parties by mailing or delivering the same to the last known address of such counsel

This the 29th day of September, 1976.

SIDNEY W. SPRAGINS

In The United States District Court For The
Western District of Tennessee
Eastern Division

Civil Action No. C-76-104-E

Local Division 1285, Amalgamated Transit Union, AFL-CIO, CLC,

Plaintiff,

v.

Jackson Transit Authority, the City of Jackson, William T. Coleman, Jr. Secretary of Transportation, United States Department of Transportation,

and

W. J. Usery, Jr., Secretary of Labor, United States Department of Labor

Defendants.

ANSWER

Comes now the federal defendants, W. J. Usery, Jr., and William T. Coleman, Jr., by and through Robert M. Williams, Jr., Assistant United States Attorney for the Western District of Tennessee, and for answer to the plaintiff's complaint filed herein, admits, denies and alleges as follows:

1. Paragraph 1 of the complaint is denied.

2. In response to paragraph 2 of the complaint, the defendants admit the time period relative to this paragraph of the complaint, but are without sufficient knowledge to admit or deny the truth of the other allegations.

3. The defendants are without sufficient knowledge to admit or deny the allegation in paragraph 3 of the complaint.

4. The defendants are without sufficient knowledge to admit or deny the allegation in paragraph 4 of the complaint.

5. Paragraph 5 is admitted.

6. Paragraph 6 is admitted.

7. The defendants are without sufficient knowledge to admit or deny the allegation in paragraph 7 of the complaint.

8. Paragraph 8 of the complaint is admitted.

9. In response to paragraph 9 of the complaint, the defendants are without knowledge as to the exact amount of the Federal grant. All other portions of the paragraph are admitted except to deny the amount of the Federal grant.

10. The defendants admit that the quoted material is taken from paragraph 5 of the protective arrangements referred to in paragraph 10 of the complaint but would respectfully refer the Court to the paragraph in the complainant's Exhibit "C", paragraph 5 for a fair and complete reading. The defendants are without sufficient knowledge to admit or deny the rest of the allegation in paragraph 10 of the complaint.

11. The defendants admit the quoted material in paragraph 11 of the complaint is taken from paragraph 2 of the protective agreement but would respectfully refer the Court to that paragraph of the protective agreement for a fair and complete reading. The defendants are without sufficient knowledge to admit or deny the remainder of paragraph 11 of the complaint.

12. The defendants are without sufficient knowledge to admit or deny the allegation in paragraph 12 of the complaint.

13. The defendants are without sufficient knowledge to admit or deny the allegation in paragraph 13 of the complaint.

14. The defendants are without sufficient knowledge to admit or deny the allegation in paragraph 14 of the complaint.

15. The defendants are without sufficient knowledge to admit or deny the allegation in paragraph 15 of the complaint.

16. The defendants are without sufficient knowledge to admit or deny the allegation in paragraph 16 of the complaint.

17. The defendants are without sufficient knowledge to admit or deny the allegation in paragraph 17 of the complaint.

18. The defendants are without sufficient knowledge to admit or deny the allegation in paragraph 18 of the complaint.

19. The defendants are without sufficient knowledge to admit or deny the allegation in paragraph 19 of the complaint.

20. The defendants deny the allegation in paragraph 20 of the complaint.

21. The defendants admit the allegation in paragraph 21 of the complaint.

22. The defendants deny the allegation in paragraph 22 of the complaint.

23. The defendants deny the allegation in paragraph 23 of the complaint except to admit its responsibilities under the appropriate statute which speak for themselves.

24. The defendants do not have sufficient knowledge to admit or deny the allegation in paragraph 24 of the complaint.

All of the allegations in the complaint not herein admitted or denied or explained are hereby denied as if specifically denied.

First Separate Defense

The Honorable Court lacks both personal and subject matter jurisdiction in this cause of action.

Second Separate Defense

The complaint fails to state a claim upon which relief can be granted as against the United States.

Respectfully submitted,

THOMAS F. TURLEY, JR.,
United States Attorney,

BY: ROBERT M. WILLIAMS, JR.,
Assistant United States Attorney.

Certificate of Service

I, Robert M. Williams, Jr., Assistant United States Attorney for the Western District of Tennessee, hereby certify that a copy of the foregoing Answer has been mailed, first class postage prepaid, to Jacobs, Burns, Sugarman & Orlove, 201 North Wells, Suite 1900, Chicago, Illinois 60606, and Anthony J. Sabella, Esq., 100 North Main Street Building, Memphis, Tennessee 38103, this 16th day of November, 1976.

ROBERT M. WILLIAMS, JR.,
Assistant United States Attorney.

In The United States District Court
For The Western District of Tennessee
Eastern Division

Civil Action No. 76-104 E

Local Division 1285, Amalgamated Transit Union, AFL/CIO/CLC,

Plaintiff,

vs.

Jackson Transit Authority, The City of Jackson, William T. Coleman, Jr., Secretary of Transportation, and William J. Usery, Secretary of Labor, United States Department of Labor,

Defendants.

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE MOTION TO DISMISS BY DEFENDANTS JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON

Filed 1/18/77

STATEMENT OF FACTS

As set forth in Plaintiff's Complaint,[1] this is an action by Local Division 1285, Amalgamated Transit Union, representative of the employees of the Jackson Transit Authority, against Defendants Jackson Transit Authority, the City of Jackson, William T. Coleman, Jr., Secretary of Transportation, and William J. Usery, Secretary of Labor, United States Department of Labor, for violation of their obligations under the Urban Mass Transportation Act, 49 U.S.C. § 1601, *et seq.*, ("UMTA"), and for breach of agreements made in fulfillment of the requirements of that Act.

[1] The allegations about the Complaint must be taken as true for purposes of this Motion to Dismiss.

Since 1941, employees of the Jackson Transit system have been represented for the purposes of collective bargaining by Division 1285. From 1941 to 1966, when the system was privately owned and operated, Division 1285 bargained for and entered into a series of collective bargaining agreements with the management of the system [Complaint, ¶ 11]. In April 1966, the City of Jackson created the Jackson Transit Authority (hereafter "JTA") to take over operation of the City's public transportation system from its private owners [Complaint, ¶ 4 and Exh. "A"]. At the same time, the Transit Authority, through its manager, T. O. Petty, entered into a collective bargaining agreement with Division 1285 [Complaint, Exh. "D"]. That Agreement between the JTA and Division 1285 has been extended with modifications throughout the period from 1966 until the events giving rise to this lawsuit [Complaint, ¶ 12]. The collective bargaining agreement was extended most recently in June 1975 with an effective date of April 1, 1975, and an expiration date of April 1, 1978 [Complaint, Exh. "E"].

In July 1966, after the execution of the April 1966 Agreement with Division 1285, the JTA applied for a grant under the provisions of the Urban Mass Transportation Act of 1964 [Complaint, Exh. "C", ¶ 1]. Under the terms of that law:

> It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority

> of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5 (2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements. [49 U.S.C. § 1609(c)].

(§ 10(c) of the Act in effect at that time is now § 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609(c), as amended.) Accordingly, Division 1285 and the JTA entered into an agreement on July 26, 1966 setting forth the protective arrangements required by the Act. [Complaint, Exh. "C"]

Under the § 13(c) Agreement, the JTA acknowledged that it had applied for a capital grant from the federal government to provide bus service in place of the private bus service which had terminated on April 2, 1966 and that the Agreement was to cover any employees who might be affected by the grant [Complaint, Exh. "C", ¶ 1]. The Agreement further provides that it is binding on the JTA and any of its successors and that all public bodies involved in the operation of the transit system would comply with the requirements of § 13(c) of the UMTA. Substantively, the Agreement provided that: (1) all existing rights, privileges, and benefits of employees under existing collective bargaining agreements and otherwise were to be preserved and continued; (2) the collective bargaining rights of represented employees, including the right to enter into collective bargaining agreements and to arbitrate, were preserved and continued; (3) there should be compulsory arbitration for labor disputes; (4) terminated or laid off employees were entitled to certain rights of priority employment or reemployment. These guarantees of continued rights and benefits were applied to the events before, during and subsequent to the institution of the federally financed project [Exh. "C", ¶ 11]. The Agreement

further provides that not only was it part of the contract between the federal government and the Transit Authority, but it was *independently binding and enforceable upon the parties* [Exh. "C", ¶ 13]. On September 1, 1966, this Agreement was certified by the Secretary of Labor pursuant to the provisions of § 13(c), and the Urban Mass Transportation Administration approved the grant to the JTA [Complaint, ¶ 9]. In the ensuing years, the JTA and Division 1285 bargained collectively and entered into successive extensions of the 1966 collective bargaining agreement, including provisions effectuating the § 13(c) Agreement.

In December 1975, the Authority unilaterally declared the current collective bargaining agreement to be null and void [Complaint, ¶ 13]. Thereafter, the JTA unilaterally withheld contractual cost-of-living increases, altered unilaterally the sick and funeral leave, vacation and holiday benefits, and threatened to suspend the dues check-off for members of Division 1285 [Complaint, ¶ 17]. Representatives of Division 1285 requested a determination by the Secretary of Labor that by these acts the Defendants had breached their obligations under the § 13(c) Agreement and for enforcement of the Agreement [Complaint, ¶ 21]. The Secretary of Labor failed to exercise his Statutory duty to do so [Complaint, ¶ 22]. Further, Defendant William T. Coleman, Jr., Secretary of Transportation, also failed to enforce the terms of the grant contract between the Department and the Defendant City of Jackson incorporating the terms of the § 13(c) Agreement [Complaint, ¶¶ 22 & 23]. Most recently, in a letter dated December 14, 1976, from Bernard E. DeLury, Assistant Secretary of Labor, the Department of Labor informed the Union that its response to the Union's request to enforce the law was limited to its Answer in the instant case. (A copy of the letter from Assistant Secretary of Labor DeLury to Dan V. Maroney, International President, Amalgamated Transit Union, is attached to this Memorandum as Exhibit "A" and made a part hereof). As the record in this action reflects, the Defendant Secretary of

Labor has answered Plaintiff's Complaint and raised a number of defenses. The Secretary's Answer indicates that he will not take the required action to enforce the law except as a result of an order of this Court.

Accordingly, Plaintiff has filed this action for violation of the Agreement effectuating § 13(c) of the UMTA, for breach of the Agreement, and to compel the Secretary of Labor and the Secretary of Transportation to enforce the UMTA; Plaintiff also sues to enforce the current collective bargaining agreement which resulted from the procedures and arrangements established by the § 13(c) Agreement.

ARGUMENT

I.

This Court has jurisdiction over this action as a Federal question under 28 U.S.C. § 1331 and as a claim under a statute regulating commerce under 28 U.S.C. § 1337

Defendants City of Jackson and JTA contend that this Court lacks jurisdiction over this action for breach of conditions mandated by § 13(c) of the UMTA, 49 U.S.C. § 1609(c). To the contrary, as set forth in Plaintiff's Complaint, this Court has jurisdiction of this action under both 28 U.S.C. § 1331 establishing jurisdiction over federal questions and 28 U.S.C. § 1337 establishing federal jurisdiction over claims arising under a federal statute regulating commerce.

Section 13(c) of the UMTA requires that, as a condition of assistance from the federal government, the recipients of federal money for transportation projects must agree to protect the interests of employees affected by the federal grant. In this case, the § 13(c) arrangements were embodied in the § 13(c) Agreement referred to above, preserving the rights of the employees to, *inter alia*, bargain collectively and conclude binding collective bargaining agreements with their employer, the JTA. Plaintiff contends that the protective arrangements embodied in the § 13(c)

Agreement are mandated by the UMTA and that this action to enforce such arrangements thus arises under the laws of the United States, as required for jurisdiction under 28 U.S.C. § 1331. Moreover, the UMTA is an Act regulating commerce; see, H.R. Rep. No. 204, 1964 U.S. Code Congressional and Administrative News, pp. 2569, 2573. accordingly, this Court also has jurisdiction under 28 U.S.C. § 1337.

In their Memorandum in Support of their Motion to Dismiss, Defendants JTA and the City of Jackson appear to be contending that their violation of the § 13(c) Agreement does not violate the Act, because the Act requires only that such an Agreement be executed, not fulfilled [Memorandum of Defendants JTA and City of Jackson, at p. 2]. Such a contention is an untenable construction of the statute and it lacks any foundation in the language or legislative history of the Act. Pursuant to § 1609(c), the establishment of the arrangements contained in the § 13(c) Agreement is a condition of the receipt of federal grants udner the Act. Under the Defendants' interpretation, the federal statute requires only execution of the document, and the substantive rights embodied in the § 13(c) Agreement are not encompassed in the statute. Under Defendants' formulation, the federal statute requiring such an Agreement would not be violated even if Defendants executed the requisite paper and renounced it immediately after pocketing the federal money.

Predictably, the Courts have routinely treated breach of the contract required by statute as a violation of the statute itself. *Bradford School Bus Transit, Inc., et al. v. Chicago Transit Authority, et al.*, 537 F.2d 943 (7th Cir. 1976); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 934 (2nd Cir. 1968). Further, the Courts have held that when a federal statute requires a contractual commitment from the recipient of federal benefits, any person aggrieved by breach of the required contract is in the same position to sue in federal court as a plaintiff suing directly to enforce the statutory obligation. *Brad-*

ford, supra; Norwalk, supra. In both *Bradford* and *Norwalk,* the Courts specifically held that the embodiment of the statutory requirement in a contract does not alter the cause of action. In *Bradford,* the plaintiffs sued to enforce the UMTA, which is also the subject of the case at hand. Section 1602 of the UMTA provides:

> (g) No Federal financial assistance shall be provided under this chapter for the construction or operation of facilities and equipment for use in providing public mass transportation service to any applicant for such assistance unless such applicant and the Secretary shall have first entered into an agreement that such applicant will not engage in schoolbus operations, exclusively for the transportation of students and school personnel, in competition with private schoolbus operators. [537 F.2d at 944].

When the CTA, a recipient of federal money under UMTA, successfully bid to transport students attending the Chicago Public Schools, plaintiff, a competing private school bus company, sued to enforce § 1602(g) of the Act. The Court found that the plaintiffs had standing to seek enforcement of the contract between the CTA and the federal government as if they were seeking direct enforcement of the Act:

> That Congress provided for enforcement of the relocation provisions through contracts with the local agencies does not weaken the appropriateness of judicial review, for such a method of enforcement is natural where Congress is specifying what requirements local agencies must meet in order to receive federal aid. The possibility that an administrative agency, charged with enforcing a requirement established by Congress in the public interest, will not adequately perform the task is equally great whether enforcement is through contract or through direct regulation. [537 F.2d, at 948, quoting *Norwalk CORE].*

Similarly, in *Norwalk CORE,* the Federal Housing act, 42 U.S.C. § 1445(c), required that, as a condition of receipt of federal money for urban redevelopment, all local aid

recipients must agree to provide relocation for residents displaced by their projects. When the local redevelopment agency in Norwalk, Connecticut, allegedly failed to provide adequate relocation efforts as required by its contract with the Department of Housing and Urban Development, the local Congress on Racial Equality sued to enforce the protective provisions of the Act. The Court found that CORE had standing to enforce the Federal Housing Act as embodied in the contract between the Department and the local authority in federal court. In sum, the embodiment of the Defendants' statutory obligations in a contract does not affect the jurisdiction of the Court.

As shown above, the allegation of violation of the § 13(c) Agreement states a cause of action arising under the UMTA. In their Memorandum, Defendants further assert that Plaintiff cannot enforce the UMTA, because the statute contains no specific provision for a right of action [Defendants Memorandum, p. 3, ¶ 4]. The tests for standing to sue are clearly set forth in a series of Supreme Court decisions and are by now beyond dispute. The law requires no explicit provision for standing if a plaintiff is personally aggrieved by an injury in fact and if the injury falls within the zone of interests intended to be protected by the statutory scheme. *Association of Data Processing v. Camp*, 397 U.S. 150, 154 (1970); *accord, Barlow v. Collins*, 397 U.S. 159 (1970); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973).

In *Association of Data Processing, supra*, the Court held that companies engaged in data processing had standing to challenge a ruling of the Comptroller of the Currency allowing national banks to engage in similar services. The Court found that this statute, limiting banks to banking activities, protected potential competitors like the plaintiffs, giving them standing to sue. In *Barlow v. Collins*, 397 U.S. 159 (1970), the Court held that tenant farmers had standing to challenge a change in administrative regulations of the Department of Agriculture that exposed their federal crop payments to attachment by their landlords. The farmers alleged that these new regulations

by the Secretary of Agriculture allowed their landlords to demand the federal funds as rent, leaving the tenants with no source of credit for tools, etc. Despite the absence of specific language conferring standing, the Court held that the tenants had standing to enforce the Act. The Court took particular note that the legislative history demonstrated a primary Congressional intent to protect the tenants:

> Implicit in the statutory provisions and their legislative history is a congressional intent that the Secretary protect the interests of tenant farmers. Both of the relevant statutes expressly enjoin the Secretary to do so. The Food and Agriculture Act of 1965 states that "[t]he Secretary shall provide adequate safeguards to protect the interests of tenants * * *." 79 Stat. 1196, 7 U.S.C. § 1444(d)(10) (1964 ed., Supp. IV). [footnote omitted] Title 7 U.S.C. § 1444(d)(13) (1964 ed., Supp. IV), as noted earlier, incorporates by reference § 8(g), as amended, 52 Stat. 35 and 205, 16 U.S.C. § 590h(g). Section 8(b) of that Act, in turn, provides that "the Secretary shall, as far as practicable, protect the interests of tenants * * *." 52 Stat. 32, 16 U.S.C. § 590h (b). [397 U.S., at 164].

In the case at hand, both the statutory language and the legislative history reveal that Plaintiff represents the very employees whom Congress intended to protect by the requirements of § 1609(c). The statute itself sets forth that Congress intended to prevent a worsening of the position of any workers as a result of federal assistance:

> (3) the protection of individual employees against a worsening of their positions with respect to their employment; [49 U.S.C. § 1609(c)(3)].

The legislative history of the Act reinforces that conclusion. Section 1609(c) as it now reads was debated as an amendment proposed by Senator Morse of Oregon to the Senate bill setting forth UMTA. Statements made by Senator Morse, explaining the policy reasons behind his proposed amendment detailed the legislative intent behind § 1609(c):

> In my judgment, we cannot justify, as a matter of public policy, the use of Federal dollars by a local community or a governmental unit thereof to be spent for development of a transit system, the expenditure of which would result in worsening the present collective bargaining rights of free labor which operates that transit system. [109 (Part 5) Cong. Rec., at 5671 (1963)].

In 1966, Defendants took over the Jackson bus system with federal assistance. For 25 years prior to the takeover, Plaintiff represented Defendants' employees. During that time, Plaintiff and its members enjoyed all the protective provisions of the labor statutes, including the National Labor Relations Act. In the original Mass Transit Act, the predecessor to § 1609(c) was adopted by Congress to preserve those collective bargaining rights of Plaintiff and its members. In the words of Senator Morse:

> . . . the status quo must be preserved with respect to the employer-employee relationship. The relationships of the successor employer under a federally assisted project under the bill would be the same as his predecessor. [109 (Part 5) Cong. Rec., at 5676 (1963)].

* * * * * *

> In my judgment, the Senate should, as a matter of public policy, adopt the Morse amendment, underwriting the basic principle that the Senate does not propose to take away from labor, in the Mass Transit Bill, hard-earned collective bargaining rights achieved over the years.
>
> . . . I am making the argument for free enterprise in maintaining to the extent possible private ownership of transportation companies under free collective bargaining. I am standing here fighting for the economic freedom of employers and Unions in this country to continue their collective bargaining arrangements without Congress creating a system of public ownership of transit systems which would override in a moment employee rights and interests

established in decades of free negotiation. [109 (Part 5) Cong. Rec., at 5677 (1963)].

It could not be more apparent that Plaintiff and its members are the primary beneficiaries of § 1609(c) and any dispute involving the terms of the § 13(c) Agreement is within the "zone of interests" to be protected by the statute.

Defendants' actions in this matter directly attacked the pre-existing private collective bargaining relationship protected by § 1609(c). When, in 1966, the City created the Jackson Transit Authority to operate the private bus system [Complaint, Exh. "A"], the City authorized the Authority to employ T. O. Petty, an individual, to manage the bus system [Complaint, Exh. "B"]. In the § 13(c) Agreement, the Defendants expressly authorized T. O. Petty to operate the transit system on their behalf and agreed to respect the collective bargaining rights enjoyed by Plaintiff, including the right to negotiate tand conclude binding collective bargaining agreements and to submit any labor dispute to binding arbitration [Complaint, Exh. "C"]. Defendants agreed that not only was T. O. Petty bound by the § 13(c) Agreement, but that Defendants were bound, and that any successor to T. O. Petty or Defendants was also obligated under the § 13(c) Agreement. Defendants have unilaterally rescinded a current collective bargaining agreement [Complaint, Exh. "F"], have denied the existence of any contractual relationship between Plaintiff and Defendants [Complaint, Exh. "F", p. 3], have denied that Plaintiff could exercise long established collective bargaining rights through the manager of the bus system, *Id.*, and have denied their obligation to respect the collective bargaining agreement. Finally, Defendants have refused to arbitrate the resulting labor dispute as required by the § 13(c) Agreement. Plaintiff no longer has recourse to remedies for such breaches of contract under the National Labor Relations Act; § 1609(c) was designed to protect Plaintiff against this very injury, and thus Plaintiff has standing to bring this action.

Having wrongfully contended that this Court lacks jurisdiction over this action under 28 U.S.C. § 1331 and § 1337, Defendants attempt to attack this Court's pendent jurisdiction over them on the grounds that the claim against the federal Defendants is insubstantial. Thus, Defendants JTA and the City of Jackson do not even address themselves to the substance of Plaintiff's federal claim against them for breach of § 1609(c). Their sole authorities on the question are directed to the substantiality of Plaintiff's claims against Defendants Usery, Secretary of Labor, and Coleman, Secretary of Transportation. *Kendler v. Wirtz*, 388 F.2d 381 (3rd Cir. 1968) and *Congress of Railway Unions v. Hodgson*, 326 F. Supp. 68 (D.D.C. 1971). Defendants JTA and the City of Jackson contend that, under *Kendler* and *Congress*, Plaintiff is precluded from seeking review of the judgment of Defendant Secretaries and refer this Court to a projected Motion to Dismiss of Defendant Secretaries. However, Defendant Secretaries have not filed such a motion. They have filed an Answer, and this motion by Defendants JTA and the City of Jackson is not the appropriate forum to delineate the substance of Plaintiff's action against the other Defendants. Insofar as the arguments of Defendants City of Jackson and JTA regarding this action against the federal Defendants are pertinent to this Court's pendent jurisdiction of its claims against them, see pages 15-19, *infra*.

In sum, § 1609 of the UMTA conditions the receipt of federal funds upon the making of a § 13(c) Agreement. Defendants City of Jackson and JTA have breached that Agreement in violation of § 1609, and this Court has jurisdiction over the action of Division 1285 to enforce the federal statute by enforcing the § 13(c) Agreement and the collective bargaining agreement entered in fulfillment of the law.

II.

This Court Has jurisdiction to enforce the § 13(c) Agreement and the collective bargaining Agreement contracts arising under the UMTA

As set forth above, Congress intended to prevent the use of federal assistance to worsen the positions of any workers with respect to their employment. It therefore provided, as a statutory requirement, that a grant applicant enter into an arrangement to preserve pre-existing rights and that the arrangement be approved by the Secretary of Labor. 49 U.S.C. § 1609(c)(3). Congress could not have drafted a statute adequate to preserve expressly the many and diverse conditions of the thousands of groups of workers who might be affected by federal assistance under UMTA. Instead, it adopted a statutory procedure for granting explicit recognition to those conditions in each case. Thus, through the certification of the Secretary of Labor, the protective provisions of the statute are made explicit by the § 13(c) Agreement, and the Agreement is enforceable as a federal claim.

Contrary to the representations of Defendants, Congress did not intend the § 13(c) Agreement to be an ordinary contract to be interpreted under state contract law. As the legislative history reveals, Congress was aware of the existence of some state laws that would make collective bargaining contracts unenforceable against public employers and it intended to preempt such laws by requiring aid recipients to guarantee, through a § 13(c) Agreement, that collective bargaining rights enjoyed under federal labor laws would be preserved. In the words of Senator Morse:

> The State can continue its State policy if it wishes to; but in the judgment of the Senior Senator from Oregon, the State should not be allowed to receive Federal money with which to continue a policy that is in conflict with sound Federal policy (reference here to Federal labor policy guaranteeing collective bar-

> gaining rights, etc) [109 (Part 5) Cong. Rec. at 5672 (1963)].
>
> * * * * * *
>
> In my judgment, the only sound policy to which you are entitled is the maintenance of the status quo. If you have collective bargaining now, I think the bill ought to be drawn so that you will be assured of a continuance of collective bargaining so far as the Federal Government is concerned. [109 (Part 5) Cong. Rec., at 5672 (1963).]
>
> * * * * * *
>
> The point I wish to stress in the legislative history is that the successor company stands in exactly the same shoes as the predecessor company, and whatever was binding upon the predecessor company in regard to the matter of conditions of employment is binding upon the successor company. [109 (Part 5) Cong. Rec., at 5673 (1963)].

Thus, if local governments receive assistance offered by the federal government, federal law requires the local authority to guarantee the preservation of existing collective bargaining rights of employees; if there are local laws to the contrary, they must fall, since any deprivation of collective bargaining rights would be "in conflict with the policy of the bill" [109 (Part 5) Cong. Rec., at 5684 (1963) (remarks of Senator Morse)].

The § 13(c) Agreement represents federal labor law for the parties to the Agreement. The rights and remedies may be as broad as the National Labor Relations Act, or they may be very narrow, depending upon the character of the collective bargaining rights of the employees prior to the time of the § 13(c) Agreement. In this case, the obligations were incorporated into a collective bargaining agreement.

As the contractual embodiment of federally guaranteed rights, the § 13(c) Agreement is enforceable in federal court. *Bradford, supra; Norwalk CORE, supra.* It is an

agreement required under a federal statute, certified by the Secretary of Labor and embodying rights created by federal statute — and potentially in conflict with state contract laws. The pervasive federal character of the rights created by the Agreement establishes the existence of federal jurisdiction.

III.

Alternatively, this Court has pendent jurisdiction to enforce the grant contract and collective bargaining agreement entered thereunder

A. Plaintiff has stated a substantial federal claim against Defendants Usery and Coleman.

Even assuming, *arguendo*, that this Court lacks independent federal jurisdiction to enforce the § 13(c) Agreement and the collective bargaining agreement, this Court does have pendent jurisdiction over these claims, because they arise from the same nucleus of operative fact as the Plaintiff's federal claims against Secretaries Usery and Coleman. In their Memorandum, Defendants JTA and City of Jackson contend that Plaintiff's federal claim is not substantial, because the Secretaries' actions or failures to act are an exercise of unreviewable discretion, citing *Kendler, supra*, and *Congress, supra.*

To the contrary, federal jurisdiction does exist to compel the Secretaries to enforce the Act. Section 12(e) of UMTA, 49 U.S.C. § 1608(a) (as amended), charges the Secretary of Transportation with enforcement of the grant contract with Defendants. Section 1609(c) vests the Secretary of Labor with responsibility to ensure that protective arrangements embodied in the Agreement are adequate to protect the employees. A court is limited in its power to enforce these requirements only to the extent that a matter entirely "committed to the discretion" of the Secretary of Transportation or Secretary of Labor is not subject to judicial review. § 701(a)(1) of Administrative Procedure Act, 5 U.S.C. § 701(a) (as amended). This is not such a case. The Supreme Court has repeatedly ruled that

there is a strong legal presumption against a finding that the courts may not review agency action.

Barlow v. Collins, supra; Citizens for the Preservation of Overton Park v. Volpe, 401 U.S. 402 (1971); see also, *Sabin v. Butz*, 515 F.2d 1061 (10 Cir. 1975) and *Ness Inv. Corp. v. United States Dept. of Agr., Forest S.*, 512 F.2d 706 (9 Cir. 1975).

In *Citizens v. Volpe, supra*, the statute in question required the Secretary to find that there was no feasible alternative before putting a road through a park. The Supreme Court ruled that, although the Secretary's decision is entitled to a strong presumption of validity, the Courts have jurisdiction to review, *inter alia*, whether the Secretary of Transportation had met the statutory requirement to gather information adequate to support his decision. Similarly, in the instant case, Plaintiff seeks not to review the wisdom of the § 13(c) arrangements, but to enforce both Secretaries' obligations to comply with the statutory mandate to see that some arrangements are made and enforced. Thus, Defendants' sole authorities for the non-reviewability of the Secretaries' action are totally inapposite.

Both *Kendler, supra*, and *Congress, supra*, cited by Defendants at page 3 of their Memorandum, involve attempts to dispute the finding by the Secretary of Labor that particular protective arrangements for employees were sufficiently protective. The *Kendler* and *Congress* courts both held that they could not review the Secretary of Labor's exercise of his discretion to choose among varying arrangements for the protection of employees. As the *Kendler* court expressed it, there is no judicial review under the UMTA for a mere difference of opinion as to the quality of the protective arrangements.

Here, however, the Secretary of Labor has exercised his discretion; he approved the arrangements in the 1966 § 13(c) Agreement. Since the Defendants JTA and City of Jackson acted to breach the Agreement in 1975, the

Secretary of Labor has failed to take any action to enforce the arrangements which he exercised his discretion to approve. The Secretary's failure to exercise his discretionary authority has left the employees with no protective arrangements whatever — resulting in a complete abrogation of § 1609 of the Act. Although the statute vests the Secretary of Labor with some discretion over the substance of the protective arrangements, Defendants appear to contend that the federal grants could be made with no arrangements at all. Such an interpretation would render § 1609 a nullity. Abrogation of authority is not within the discretion of the Secretary.

Similarly, Defendant Secretary of Transportation is charged with enforcement of the entire UMTA, 49 U.S.C. § 1608(a), and nothing in the Act indicates that his actions are beyond review. Both of Defendants' authorities — *Kendler* and *Congress* — involve the initial determination of the Secretary of Labor, not the ongoing enforcement of the Act by the Secretary of Transportation, and they are thus irrelevant to the allegations directed at the Secretary of Transportation.

In sum, nothing in the UMTA vests the Secretaries with discretion to refuse to enforce the Act, as they have done here. Absent an explicit commitment of such authority to the Secretaries, this Court has jurisdiction to compel the Secretaries to enforce the Act as embodied in the grant contract, the § 13(c) Agreement, and the collective bargaining agreements entered into pursuant to collective bargaining rights established in that Agreement. Plaintiff's action to compel Defendants JTA and the City of Jackson to abide by the § 13(c) Agreement and the collective bargaining arrangements pursuant to the Agreement is pendent to a substantial federal action and may be decided by this Court.

Defendants also contend that this Court lacks pendent jurisdiction over Plaintiff's action for breach of the § 13(c) Agreement and the collective bargaining agreement, because Plaintiff's state and federal actions do not constitute

a single cause under the standards set forth in *Hurn v. Ousler*, 289 U.S. 238 (1933). Defendants' contention is utterly without merit, since the test for pendent jurisdiction established in *Hurn* was definitively and explicitly discarded by the later Supreme Court decision in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The Court held:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *," U.S. Const., Art. III, § 2 and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 53 S. Ct. 549, 77 L. Ed. 1062. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole. [Emphasis in original]. [383 U.S. at 725].

Even a cursory examination of the Complaint reveals that the same facts support both Plaintiff's claim that Defendants JTA and City of Jackson breached their Agreements and that Defendants Usery and Coleman failed to enforce the federal law. The existence of a prior collective bargaining relationship, the 1966 takeover of the private transit system, the § 13(c) Agreement, the collective bargaining relationship since the receipt of federal money and the actions in breach of the Agreements all serve to establish all of Plaintiff's claims and thus this Court's jurisdiction over all claims under the *Gibbs* standard.

Contrary to Defendants' representations, the existence of separate claims against separate defendants does not

alter this conclusion for two reasons. One, Plaintiff claims that the breach of the § 13(c) Agreement by Defendants JTA and City of Jackson is a violation of the federal UMTA, giving rise to federal jurisdiction over those defendants under 28 U.S.C. § 1331 and § 1337. See, pp. 5-14, *supra*. Thus, even assuming, *arguendo*, that the breach of the collective bargaining agreement does not also give rise to a federal action for violation of the UMTA,[2] Plaintiff's State claim against Defendants JTA and City of Jackson is pendent to the federal claim against the same Defendants. Alternatively, even if all of Plaintiff's claims against Defendants JTA and City of Jackson were construed as State claims, since the expansion on the tests for pendent jurisdiction in *Gibbs*, numerous federal courts have ruled that federal jurisdiction over one party gives rise to pendent jurisdiction over a closely related claim against a different party. *Schulman v. Huck Finn, Inc.*, 472 F.2d 864 (8 Cir. 1973); *Leather's Best, Inc. v. S. S. Mormaclynx*, 451 F.2d 800 (2 Cir. 1971); *Connecticut Gen. Life Ins. Co. v. Craton*, 405 F.2d 41 (5 Cir. 1968); *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*, 441 F.2d 627 (2 Cir. 1971).

By contrast to these decisions, the line of cases cited by Defendants, all decided by District Courts, are of doubtful precedential value. Each of Defendants' authorities relies upon the now discarded standards in *Hurn* or cases decided in reliance on *Hurn* before the Supreme Court's decision in *Gibbs*. The value of the cases cited by Defendants was further undermined by the Supreme Court's recent decision in *Moor v. County of Alameda*, 411 U.S. 693 (1973), in which the Court noted that cases decided before *Gibbs* were of little continued utility. Where, as here, the claims are so intimately related and the operative facts are almost precisely co-extensive, all considerations supporting the existence of pendent jurisdiction mandate its application here.

[2] As set forth above, Plaintiff strenuously contends that its entire action against Defendants JTA and City of Jackson, including its action for breach of the collective bargaining agreement, constitutes a federal question.

CONCLUSION

Defendants' Motion to Dismiss the Complaint for lack of jurisdiction should be denied.

Respectfully submitted,

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LINDA R. HIRSHMAN,
Counsel for Plaintiff.

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U.S. DEPARTMENT OF LABOR

Office of the Assistant Secretary
Washington

December 9, 1976

Mr. Dan V. Maroney, Jr.
International President
Amalgamated Transit Union
5025 Wisconsin Avenue, N.W.
Washington, D.C. 20016

Dear Mr. Maroney:

This is in further reference to your letter of January 29, 1976, requesting a determination as to the continued eligibility of the City of Jackson, Tennessee to receive Federal funds under the Urban Mass Transportation Act of 1964, as amended.

In your letter you described what you believe to be violations of the Section 13(c) agreement executed by the Jackson Transit Authority and the Amalgamated Transit Union Local Division 1285 (ATU) on July 26, 1966, in connection with a project to assist in the purchase of buses and equipment, and the construction of a building, (TN-03-0002). Specifically, you refer to the Authority's alleged refusal to honor the most recent collective bargaining agreement applicable to the transit system and its employees, executed on April 1, 1975, as the basis for the alleged violations of the Section 13(c) agreement.

By letter dated February 20, 1976, we solicited the views of the Jackson Transit Authority on the issues raised in your letter. In its response, dated March 5, 1976, a copy of which has previously been forwarded to your office, the Authority takes issue with the claims alleged in your correspondence. The record further indicates an apparent discrepancy between the parties as to the substantive content of the Section 13(c) agreement upon which our September 1, 1966 certification of the above referenced project was based. Separate and distinct documents were submitted by the Authority and the ATU as being a copy of the original agreement upon which our certification was based. As the issues in dispute appear to involve interpretations of the substantive portions of the Section 13(c) agreement, it is imperative to resolve this disagreement.

Our letter of certification for the above referenced project stated that the parties had executed an agreement which met the requirements of Section 13(c) of the Act.

Department of Labor records indicate that the certification was based upon our review of the agreement dated July 23, 1966, and attached as Appendix A of this ruling.

We note that you have reaffirmed your allegations in a suit filed by your organization in the United States District Court for the Western District of Tennessee, Eastern Division on August 10, 1976. In view of the fact that your organization has filed suit, the Department of

Labor will set forth its position with respect to the issues raised in your letter in its response to the complaint that has been filed in this case. Therefore, it would not be appropriate to comment further on the dispute at this time.

Sincerely,

BERNARD E. DELURY,
Assistant Secretary of Labor.

Enclosure

cc: Mr. Evan Davis, President
Jackson Transit Authority

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Friday, the 14th of January, 1977, I caused the foregoing Plaintiff's Memorandum in Opposition to the Motion to Dismiss by Defendants Jackson Transit Authority and the City of Jackson to be served by mailing copies thereof by first class mail, postage prepaid, to the following:

SIDNEY W. SPRAGINS, ESQ.
SPRAGINS & MURCHISON
Elks Building
Postoffice Box 2004
Jackson, Tennessee 38301

THOMAS F. TURLEY, JR., ESQ.
United States Attorney
Attention: Robert M. Williams, Jr., Esq.
Assistant United States Attorney
1058 Federal Office Building
Memphis, Tennessee 38103

LINDA R. HIRSHMAN

In The United States District Court
For The Western District of Tennessee
Eastern Division

Civil Action No. C-76-104E

Local Division 1285 Amalgamated Transit Union, AFL-CIO, CLC,

Plaintiff,

v.

Jackson Transit Authority, the City of Jackson, William T. Coleman, Jr., Secretary of Transportation, United States Department of Transportation, and W. J. Usery, Jr., Secretary of Labor, United States Department of Labor,

Defendants.

MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

Comes now the United States of America by and through Robert M. Williams, Jr., Assistant United States Attorney for the Western District of Tennessee, on behalf of the Federal defendants and hereby makes this its motion to dismiss or in the alternative, motion for summary judgment.

I.

The Federal defendants move this Court pursuant to Rule 12 of the Federal Rules of Civil Procedure to dismiss this complaint as to the Federal defendants on the ground that this Honorable Court lacks jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief can be granted.

II.

In the alternative, the United States would move the Court under Rule 56 of the Federal Rules of Civil Procedure to grant summary judgment in its favor upon the grounds that there is no genuine issue as to any material fact and that the Federal defendants are entitled to a judgment as a matter of law.

In support of its motion the United States would respectfully refer the Court to the attached Memorandum of Law in support of the United State's motion to dismiss or in the alternative for summary judgment complete with exhibits and supporting affidavits.

Respectfully submitted,

THOMAS F. TURLEY, JR.
United States Attorney

By: ROBERT M. WILLIAMS, JR.,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I, Robert M. Williams, Jr., Assistant United States Attorney for the Western District of Tennessee, hereby certify that a copy of the foregoing Motion has been mailed, first class postage prepaid, to Jacobs, Burns, Sugarman & Orlove, 201 North Wells, Suite 1900, Chicago, Illinois 60606; Anthony J. Sabella, Esq., 100 North Main Building, Memphis, Tennessee 38103; Sidney W. Spragins, Spragins and Murchison, Elks Building, P.O. Box 2004, Jackson, Tennessee 38301; and Jerry Davis, Esq., Department of Labor, New Labor Building — Room N-2700, 200 Constitution Avenue, NW., Washington, D. C. 20210, this 9th day of February, 1977.

ROBERT M. WILLIAMS, JR.,
Assistant United States Attorney.

In The United States District Court
for The Western District of Tennessee
Eastern Division

Civil Action No. C-76-104E

Local Division 1285, Amalgamated Transit Union, AFL-CIO, CLC,

Plaintiff,

v.

Jackson Transit Authority, the City of Jackson, William T. Coleman, Jr., Secretary of Transportation, United States Department of Transportation, and W. J. Usery, Jr., Secretary of Labor, United States Department of Labor,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Comes now the United States of America, by and through Robert M. Williams, Jr., Assistant United States Attorney for the Western District of Tennessee, on behalf of the Federal defendants, William T. Coleman, Jr., Secretary of Transportation, United States Department of Transportation and W. J. Usery, Jr., Secretary of Labor, United States Department of Labor, and hereby makes this its memorandum in support of its motion to dismiss the complaint filed herein or in the alternative for summary judgment:

I. *STATEMENT OF THE CASE*

The Jackson Transit Authority was created by the City of Jackson in 1966 in order to operate and manage a public mass transportation system for the City of Jackson. The

City of Jackson received a federal grant under the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1601 *et seq.*), hereinafter referred to as the Act. As part of the requirements of receiving the grant, plaintiff and defendant Jackson Transit Authority entered into an agreement as required by Section 13(c) of the Act (49 U.S.C. § 1609(c)).

The Department of Housing and Urban Development (HUD) was responsible for administering the Act until June 30, 1968, when this responsibility was transferred to the Department of Transportation (DOT) by Reorganization Plan No. 2 of 1968 (82 Stat. 1369). All the powers and functions of the Secretary of Transportation under the Act (49 C.F.R. § 1.50) were thereafter delegated to the Administrator of the Urban Mass Transportation Administration.

The above agreement between the plaintiff and defendant Jackson Transit Authority was certified by the Assistant Secretary of Labor, James J. Reynolds on September 1, 1966.

The plaintiff in this case is an unincorporated labor organization, Division 1285, Amalgamated Transit Union, AFL-CIO, CLC (hereinafter, the Union), which represents workers in the transit industry for purposes of collective bargaining. In its suit against the Federal defendant, Jackson Transit Authority, and the City of Jackson, Tennessee, plaintiff claims that the defendant Jackson Transit Authority and the City of Jackson breached a collective bargaining agreement entered into by those defendants and the Union in 1966 and amended in 1975, thereby allegedly causing a breach of a separate agreement entered into by the same parties under Section 13(c) of the Act in 1966. Plaintiff further claims that the Federal defendants have failed to exercise their respective statutory duties to enforce the Section 13(c) agreement between defendants Jackson Transit Authority and the City of Jackson.

Plaintiff seeks a preliminary and permanent injunction, essentially requiring the Secretary of Transportation and the Secretary of Labor to enforce and the Jackson Transit Authority and the City of Jackson to comply with the Section 13(c) agreement.

The United States of America on behalf of the Federal defendants hereby moves for dismissal of plaintiff's action on the ground that the complaint fails to state a claim upon which any relief can be granted as to them. In the alternative, the Federal defendants pray for summary judgment on the ground that there is no genuine issue between the plaintiff and the United States as to any material fact, and therefore the United States is entitled to a judgment as a matter of law.

II. *STATEMENT OF FACTS*

By letter dated June 4, 1966, Mr. W. B. Hurd, Acting Director, HUD, referred to the Department of Labor an application for federal assistance filed by the City of Jackson, Tennessee (See Appendix E, Exhibit A to DeLury Affidavit). This application for a capital grant under Section 3 of the Act was to be used to purchase twelve (12) new thirty-five (35) passenger buses and accessory equipment along with the construction of a bus maintenance building (Appendix E, DeLury Affidavit, page 1). The Jackson Transit Authority had been purchased by the City of Jackson and the new equipment would be used in operating the City's transit system.

On November 14, 1966, the Urban Transportation Administration (UTA), then HUD, approved the City of Jackson's application. (Project No. TN-03-002, formerly Project No. TENN-UTG-2; see Appendix A). On December 9, 1966, the grant contract between UTA (HUD/DOT) and the City of Jackson was executed. (See Appendix B).

An agreement as to the terms and conditions of an employee protection arrangement was reached as a result of negotiations between the Jackson Transit Authority

and Local Division 1285, Amalgamated Transit Union which represented the Authority's employees. (See Appendix E, DeLury Affidavit, page 2). A copy of the agreement was sent to the Department of Labor by Mr. John M. Elliott, International President, Amalgamated Transit Union. (See Appendix E, DeLury Affidavit, Exhibit B).

By letter dated September 1, 1966, Mr. W. B. Hurd, Acting Director, Office of Transportation, Department of Housing and Urban Development was advised that the terms and conditions of the protective arrangement met the requirements of Section 10(c) (Exhibit C attached to DeLury Affidavit). Thereafter, the federal grant was issued.

As part of the protective arrangement, provision was made for the handling of disputes which arise under the agreement. Section 6 of the negotiated agreement certified by the Department provides as follows:

> In the case of any labor dispute between the Union and the Authority, the operator of the transit system, or both, that cannot be amicably adjusted by conferences between the parties, the same may be submitted at the written request of either party to a board of arbitration composed of three (3) persons, one to be chosen by the Authority, the operator of the transit system, or jointly by the Authority and the operator of the transit system, as the case may be, one to be chosen by the Union, and the two thus selected to select a third disinterested arbitrator; the findings of the majority of said board of arbitration to be final and binding on the parties thereto.
>
> Each party shall appoint its arbitrator within ten (10) days after notice of submission to arbitration has been given. Should the two arbitrators selected by the parties be unable to agree upon the selection of a third arbitrator within ten (10) days from the date of appointment of the second named arbitrator, then either arbitrator may request the American Arbitration Association to furnish a list of five (5) persons from which the third arbitrator shall be selected. The

> arbitrators appointed by the parties shall, within five (5) days after the receipt of such list determine by lot the order of elimination and thereafter each shall in that order alternately eliminate one name until only one name remains. The remaining person on the list shall be the third arbitrator. The term "labor dispute" shall be broadly construed and shall include any controversy concerning wages, salaries, hours, working conditions, or benefits, including health and welfare, sick leave, insurance or pension or retirement provisions, the making or maintaining of collective bargaining agreements, the terms to be included in such agreements, the interpretation or application of such agreements, the adjustment of grievances, any claim, difference or controversy arising out of or by virtue of any of the provisions of this agreement for the protection of employees affected by the Project.

The above grant was subject to certain statutory requirements, including those of Sections 3(e)(4) and 13(c) of the UMT Act (49 U.S.C. §§ 1602(e)(4) and 1609(c), which relate to the protection of the interests of employees affected by Federal mass transportation assistance.

Section 3(e)* reads, in pertinent part, as follows:

> No financial assistance shall be provided under this Act . . . unless . . . (4) the Secretary of Labor certifies that such assistance complies with the requirements of Section 13(c) of this Act.

Section 13(c) of the UMT Act reads as follows:

> *It shall be a condition of any assistance under Section 3 of this Act that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance.* Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of

* Subsection 3(e) was formerly subsection 3(c), but was redesignated by Section 2(1) of Public Law 91-453 (80 Stat. 715; Oct. 15, 1970).

pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to Section 5(a)(f) of the Act of February 4, 1887 (24 Stat. 379), as amended. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements. (Emphasis added).

Prior to receiving the grant under Project No. TN-03-0002 (TENN-UTG-2), JTA executed an agreement with Plaintiff Union, setting forth the terms and conditions under which employees were to receive the protection required under Section 13(c) of the UMT Act. (See Exhibit "C" to the Complaint). On the basis of this agreement, HUD requested and the Department of Labor (DOL) made the required certification to HUD concerning Section 13(c) (See Appendices C and D to this Memorandum). Hence, paragraph 6 of the UTA project grant approval memorandum (Appendix A to this Memorandum) states the following:

> 6. *Labor* — The Department of Labor in a letter dated September 1, 1966 has determined it is unlikely that the project will adversely affect transit employees, and standard grant contract provisions will suffice to afford the protection prescribed in Section 13(c) of the Urban Mass Transportation Act of 1964 as amended.

Consequently, Section 5 of Part I of the grant contract between JTA and HUD/DOT (Appendix B to this Memorandum) contains a labor warranty, as follows:

Sec. 5. *Labor Warranty* — The Public Body warrants that the Project will not adversely affect the employment and working conditions of its employees or the employees of any other carrier operating within the service area of the Jackson Transit Authority. The Jackson Transit Authority and Local 1285 of the Amalgamated Transit Union executed an agreement to meet the requirements of Section 13(c) of the Act.

III. *ARGUMENT*

A. *Federal Defendant Coleman Has No Enforcement Responsibility With Respect To Section 13(c) And Has Complied With The Provisions of Sections 13(e)(4) and 13(c) of The UMT Act.*

Plaintiff alleges that Secretary Coleman has the responsibility, pursuant to Section 12(e) of the UMT Act (49 U.S.C. § 1608(e) as amended), to enforce the grant contract with the City of Jackson, including the terms of the Section 13(c) agreement, upon the determination of a violation thereof by the Secretary of Labor. Hence, Plaintiff asks this Court to order Secretary Coleman "to take appropriate action to enforce compliance with the § 13(c) agreement . . ." (Complaint, pp. 6 and 7).

Plaintiff's case rests on the mistaken assumption that Secretary Coleman has a responsibility to enforce Section 13(c). Neither the express language of Section 13(c) nor its legislative history support the existence of such a responsibility. By its express terms, Section 13(c) requires "fair and equitable arrangements . . . as *determined by the Secretary of Labor,* to protect the interests of employees affected . . ." by mass transportation assistance. Section 13(c) requires only a "determination" and is totally silent concerning enforcement. Moreover, the section's mandate to make a determination is directed to the Secretary of Labor and not the Secretary of Transportation.

The UMT Act, including Section 13(c), evolved in 1963 and 1964 out of House Bill H.R. 3881 and Senate Bill S. 6. Each of these Bills as reported to the floor of the House

and senate contained labor protective provisions similar except in one important aspect to those provided by Section 13(c); both the House and Senate Bills would have delegated jointly the responsibility to make "fair and equitable arrangements" to the Administrator of the Housing and Home Finance Administration (predecessor to HUD) and the Secretary of Labor (*H.R. Rep.* No. 204 (to accompany H.R. 3881), 88th Cong., 1st Sess. 15-16, 20 (1963); *S. Rep.* No. 82 (to accompany S. 6), 88th Cong., 1st Sess. 28-29 (1963)).

During floor debates on H.R. 3881, Representative Rains offered and the House approved an amendment which made the labor protective provisions of the UMT Act the exclusive responsibility of the Secretary of Labor (110 Cong. Rec. 14976-79, 14985-92 (1964)). This amendment was retained by the House and approved by the Senate when the Senate passed the UMT Act (110 Cong. Rec. 15447-65 (1964)).

In short, there is no language in either the House or Senate Reports on the respective Bills and no language in the floor debates of either House to indicate that the Secretary of Transportation (then HUD) was to assume any enforcement responsibility with respect to Section 13(c). The fact that Representative Rains' amendment gave sole responsibility for making the required determination to the Secretary of Labor is even stronger evidence that Defendant Coleman has no enforcement responsibility.

Moreover, the Court of Appeals for the Third Circuit has held in the case of *Kendler v. Wirtz,* (3rd Cir. 1968), 388 F.2d 381, that determinations of the Secretary of Labor concerning what constitutes "fair and equitable arrangements" under Section 13(c) are not judicially reviewable. Certainly if Congress had intended to delegate enforcement responsibility to one executive department (HUD/DOT) to enforce the determination made by another (DOL) as to what constitutes "fair and equitable arrangements," it would have said so. Indeed, in Section 13(a) of the Act

(49 U.S.C. § 1609(a)) the Congress did expressly vest HUD/DOT with responsibility for enforcing the determinations of the Secretary of Labor as to prevailing construction wage rates in the locality of federally assisted mass transportation projects. However, in section 13(c) Congress contented itself with requiring that the employee protective arrangements determined by DOL be included in the grant contract.

In the project grant made to the City of Jackson and JTA by HUD/DOT, the fair and equitable arrangements required by the UMT Act were made when JTA and the Union signed the agreement set out as Exhibit "C" to the Complaint. These arrangements provided the basis for DOL's letter of certification prior to the grant by HUD/DOT (See Appendix D to this Memorandum), and the terms and conditions specified by DOL are contained in the grant contract (See Appendix B to this Memorandum). Thus, Secretary Coleman and his predecessors in office have complied fully with the mandate of Sections 3(e)(4) and 13(c) of the UMT Act.

Plaintiff's reliance on Section 12(e) of the UMT Act is inapposite. That section provides, in part, the following:

> . . .[N]othing in this subsection shall prevent the Secretary from taking such actions as may be necessary to require compliance by the agency or agencies involved with any undertaking furnished by such agency or agencies in connection with the application for the grant." (49 U.S.C. § 1608(e)).

Thus, while the Secretary is *authorized* by this section to take "such actions as may be necessary to require compliance" by a grantee, he is in no way *required* to take such action. On the contrary, the effect of Section 12(e) is to leave to the Secretary's discretion the determinations whether a breach of the grant contract has occurred and, where he has the authority and responsibility of enforcement, what steps to take to enforce compliance. See *McDonald v. Stockton Metropolitan Transit District*, 36 Cal. App. 3rd 436, 111 Cal. Rptr. 637, 640 (1973).

We therefore submit that there is nothing further for DOT to do with respect to the Section 13(c) agreement between JTA and the Union. The only issue before the Court is whether JTA and the City of Jackson have violated the Section 13(c) agreement and a collective bargaining agreement with Plaintiff, and, if so, what relief should be granted. Secretary Coleman has no interest in that issue and is not a necessary or proper party to the determination thereof.

B. *Any Attempt By Defendant Coleman To Enforce The Existing 13(c) Agreement Between JTA And The Union Would Contravene The Express Terms Of The Agreement.*

As above stated, Defendant Coleman has no responsibility for the enforcement of Section 13(c). Moreover, any attempt on his part to do so would violate the express terms of the agreement which is the real basis for plaintiff's claim. Paragraph 6 of the 13(c) agreement between JTA and the Union (Complaint, Exhibit C) contains a mechanism for the resolution by arbitration of just such disputes as this:

6. In the case of any labor dispute between the Union and the Authority, the operator of the transit system, or both, that cannot be amicably adjusted by conferences between the parties, the same may be submitted at the written request of either party to a board of arbitration composed of three (3) persons, one to be chosen by the Authority, the operator of the transit system, or jointly by the Authority and the operator of the transit system, as the case may be, one to be chosen by the Union, and the two thus selected to select a third disinterested arbitrator; the findings of the majority of said board of arbitration to be final and binding on the parties thereto.

Each party shall appoint its arbitrator within ten (10) days after notice of submission to arbitration has been given. Should the two arbitrators selected by the parties be unable to agree upon the selection of a third arbitrator within ten (10) days from the date of appointment of the second named arbitrator, then either arbitrator may request the American Arbitration Association to furnish a list of five (5) persons from which the third arbitrator shall be selected. The arbitrators appointed by the parties shall, within five (5) days after the receipt of such list determine by lot the order of elimination and thereafter each shall in that order alternately eliminate one name until only one name remains. The remaining person on the list shall be the third arbitrator. The term "labor dispute" shall be broadly construed and shall include any controversy concerning wages, salaries, hours, working conditions, or benefits, including health and welfare, sick leave, insurance or pension or retirement provisions, the making or maintaining of collective bargaining agreements, the terms to be included in such agreements, the interpretation or application of such agreements, the adjustment of grievances, any claim, difference or controversy arising out of or by virtue of any of the provisions of this agreement for the protection of employees affected by the Project.

The case appears to involve a "labor dispute between the Union and the Authority . . . that cannot be amicably

adjusted by conferences between the parties . . ." and therefore properly falls within the scope of this provision. Moreover, questions concerning the ". . . maintaining of collective bargaining agreements" are involved (Complaint, para. 13) and, thus, should be submitted to arbitration. By the express terms of paragraph 6 of the Section 13(c) agreement, both JTA and the Union have a vested right to the benefit of this arbitration procedure which constitutes an integral part of the "arrangements" certified by DOL to be fair and equitable. It would thus be totally inappropriate for Secretary Coleman to attempt to enforce an agreement to which DOC is not a party which contains provisions over which Secretary Coleman has no jurisdiction, and which contains a built-in mechanism for the resolution of disputes such as this.

C. *This Court Is Without Jurisdiction In This Case With Regard to The Secretary of Labor And Additionally The Plaintiff's Complaint Fails To State A Cause Of Action As Against The Secretary Of Labor In That The Secretary Of Labor Is Not A Party To The Current Collective Bargaining Agreement And The Section 13(c) Agreement And Has No Authority Under Them To Grant The Relief The Plaintiff Seeks.*

The issue before this court concerns the role of the Department of Labor in administering its responsibilities under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended.

This Act provides for grants of financial assistance by the Federal Government to state and local governments and private companies to assist in the development and improvement of mass transportation facilities. Section 3(e)(4) of the Act (49 U.S.C. 1602(e)(4)) provides that as a condition of Federal assistance under this Act, the Secretary of Labor shall certify that such assistance complies with the requirements of 13(c) of the Act (49 U.S.C. 1009(c)). This section provides that it shall be a condition of assistance that fair and equitable arrangements be made, as determined by the Secretary of Labor, to protect

the interests of employees affected by such grants. Section 13(c) further provides that the contract of assistance shall specify the terms and conditions of the protective arrangements.

The legislative history discloses that Congress intended that the terms and conditions of the protective arrangement certified by the Secretary of Labor would be reached through the process of collective bargaining between the labor organization representing the affected employees and the applicant for the Federal assistance (U. S. Code, Cong. Adm. News 1964, Vol. 2, pp. 2584, 2585). Accordingly, in carrying out his statutory function, the Secretary of Labor notifies the labor organization representing the affected employees of the receipt of a grant application. When the labor organization and the applicant have agreed upon terms and conditions to protect the interests of the affected employees, the Secretary of Labor reviews the agreement and, if it meets the requirements of Section 13(c), he advises the Administrator of the Urban Mass Transportation that employees who may be adversely affected by the project will receive the protections required by Section 13(c) of the Act. No further action is mandated on the part of the Secretary of Labor. The agreement assures that affected employees are protected.

The plaintiff does not allege that the Secretary of Labor failed to determine that adequate protections were provided for affected employees nor does plaintiff allege that this determination was improper. Rather, what plaintiff is attempting to do is impose a non-statutory duty upon the Secretary of Labor.

The plaintiff asserts that jurisdiction of this action against the Secretary of Labor arises under 28 U.S.C. 1331(a), 1337 and 1361, 49 U.S.C. 1601, *et seq.*, and that pendent jurisdiction exists with respect to a cause of action arising from breach of contract.

In order for this court to have jurisdiction under 28 U.S.C. 1331, plaintiff's action must be one which "arises

under the Constitution, laws, or treaties of the United States." Similarly, in order for this court to have jurisdiction under 28 U.S.C. 1337, plaintiff's action must "arise under" an Act of Congress regulating commerce. The key phrase in determining jurisdiction under both sections is "arising under". In order for a claim to "arise under the Constitution, laws or treaties of the United States", a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. *Gully v. First National Bank in Meridian,* 299 U.S. 109, 112 (1936). This interpretation also applies to establishing jurisdiction under § 1337. *Carlson v. Coca-Cola Co.,* 483 F.2d 279 (9th Cir., 1973).

In this case, plaintiffs have alleged a violation of Section 13(c) of the Urban Mass Transportation Act. That Act, on its face, does not grant jurisdiction to the court. Moreover, plaintiff has failed to show any statutory authority for the Secretary of Labor to take action to insure compliance with an agreement entered into and certified pursuant to 13(c) nor has plaintiff shown any authority whereby the court could order the Secretary of Labor to grant the remedy sought. (*Cf. Kendler v. Wirtz,* 388 F.2d 381 (3rd Cir., 1968) wherein the Court of Appeals would not substitute its judgment and review the decision made by the Secretary of Labor to certify an agreement entered into pursuant to Section 13(c)).

The Urban Mass Transportation Act is only indirectly involved in this case. As a condition precedent to the granting of Federal aid, plaintiff and defendant Jackson Transit Authority entered into an agreement which provided workers with guarantees of protection. The Secretary of Labor certified that this agreement met the standards set forth in 13(c). The question now before the court concerns actions allegedly taken by the Jackson Transit Authority subsequent to entering into the agreement certified by the Secretary of Labor. These actions have allegedly caused a breach both in the collective bargaining agreement and in the 13(c) agreement. The law or remedy applicable to these allegations is not the

Urban Mass Transportation Act. First, the 13(c) agreement provides the means whereby disputes arising under it are to be settled. Second, as concerns the collective bargaining agreement, the law of contracts, the agreement itself, or the National Labor Relations Act (29 U.S.C. § 141 *et. seq.*) may resolve the dispute. The Urban Mass Transportation Act merely provides the background and the basis upon which the 13(c) agreement was entered into. This alone is not enough to provide the court with jurisdiction. See, *Gully*, 299 U.S. at 115. Thus, the court does not have jurisdiction under sections 1331 and 1337.

Plaintiff also asserts jurisdiction under 28 U.S.C. 1361 which gives the district courts jurisdiction of any action in the nature of mandamus. Mandamus will only lie if there is a mandatory or ministerial obligation which is due a person. *Short v. Murphy*, 512 F.2d 374 (6th Cir., 1975). The plaintiff herein has alleged a duty which not only is not mandatory but is not prescribed by the statute. As will be shown, *infra*, the Secretary of Labor has positively performed all that the Act requires him to do in this case.

Defendant has also claimed pendent jurisdiction with respect to cause of action arising from breach of contract. In order for there to be pendent jurisdiction there must first be a federal claim sufficient enough to confer subject matter jurisdiction on the court. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). As we have shown, *supra*, there is no federal claim which confers subject matter jurisdiction. All that is present in this case is a claim for breach of contract. Thus pendent jurisdiction cannot exist.

Therefore, the Secretary of Labor moves to dismiss this complaint on the grounds that the court lacks jurisdiction over the subject matter.

However, even assuming arguendo, that the Court has jurisdiction over the subject matter, the complaint fails to state a claim against the defendant, Secretary of Labor, upon which relief can be granted.

Defendant City of Jackson entered into a contract with the Urban Mass Transportation Administrator whereby it received a grant under the Urban Mass Transportation Act. Prior to receipt of this grant plaintiff and defendant Jackson Transit Authority agreed to provide worker protections pursuant to Section 13(c) of the Act.

As is evidenced by the attached DeLury affidavit and paragraph 9 of plaintiff's complaint, the Secretary of Labor fully performed his statutory duty under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, by certifying this agreement.

Plaintiff states in Paragraph 12 of the complaint that it entered into the current collective bargaining agreement with T. O. Petty, managing agent of JTA, on April 4, 1966, which was amended April 1, 1975 with an expiration date of April 1, 1978.

Plaintiff alleges that this contract has been breached. Further, plaintiff's complaint states that actions taken by the Jackson Transit Authority have caused a breach of the 13(c) agreement entered into by the plaintiff and Jackson Transit Authority on July 26, 1966.

Section 6, as set forth above, of the 13(c) agreement provides the means for the settlement of disputes concerning ". . . the making or maintaining of collective bargaining agreements . . . any claim, difference or controversy arising out of or by virtue of any of the provisions of this agreement . . ." Therefore, the settlement of the dispute concerning the 13(c) protective agreement comes within the scope of section 6 and is to be submitted to final and binding arbitration. There is no allegation in the complaint that plaintiff has invoked the procedures described in section 6.

The resolution of labor disputes through procedures agreed upon by the parties is clearly consistent with the national labor policy of encouraging the peaceful settlement of such disputes. This policy may be effectuated only

if the settlement procedures adopted by the parties are given the opportunity to work. Thus, following the guidelines established by the Supreme Court, courts have deferred jurisdiction over disputes where the parties have agreed upon other methods for settling disputes. (See *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960), *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960)).

In short, the gravamen of the complaint involves the rights and duties of the parties under the terms and conditions of the current collective bargaining agreement and the 13(c) agreement. It is clear that the complaint alleges a dispute arising from an alleged breach of a collective bargaining agreement entered into between plaintiff and defendant Jackson Transit Authority. The Secretary of Labor is not a party to this contract and has no authority under the contract to grant the relief plaintiff seeks.

The complaint fails to state any duty owed by the Secretary of Labor to the plaintiff, or any authority under 13(c) of the Urban Mass Transportation Act for the Secretary of Labor to provide the relief plaintiff seeks. In addition, the 13(c) agreement itself provides the plaintiff with a means of resolving the dispute by invoking and following the procedures set forth in Section 6. Therefore, the complaint should be dismissed with respect to defendant Secretary of Labor, as the plaintiff has failed to state a claim upon which relief can be granted.

In the alternative, pursuant to Rule 12(b)(6) and Rule 56 of the Federal Rules of Civil Procedure, the Secretary of Labor moves for summary judgment on the grounds that there is no genuine issue as to any material fact and that defendant Secretary of Labor is entitled to judgment as a matter of law.

IV. *CONCLUSION*

It is, therefore, respectfully submitted that the complaint filed herein as against both defendants should be dismissed for lack of subject matter jurisdiction. Further, it is submitted that the complaint should be dismissed because it fails to state a claim upon which relief can be granted against the United States of America. It is further asserted, in the alternative, that the Court should grant in favor of the United States a summary judgment on the grounds that there is no genuine issue as to any material fact and that the United States is entitled to judgment as a matter of law.

Respectfully submitted,

THOMAS F. TURLEY, JR.
United States Attorney

By: ROBERT M. WILLIAMS, JR.,
Assistant United States Attorney

CERTIFICATE OF SERVICE

I, Robert M. Williams, Jr., Assistant United States Attorney for the Western District of Tennessee, hereby certify that a copy of the foregoing Memorandum has been mailed, first class postage prepaid, to Jacobs, Burns, Sugarman & Orlove, 201 North Wells, Suite 1900, Chicago, Illinois 60606; Anthony J. Sabella, Esq., 100 North Main Building, Memphis, Tennessee 38103; and Sidney W. Spragins, Esq., Spragins and Murchison, Elks Building, Jackson, Tennessee 38301, this 9th day of February, 1977.

ROBERT M. WILLIAMS, JR.,
Assistant United States Attorney.

In The United States District Court
For The Western District of Tennessee
Eastern Division

Civil Action No. 76-104E

Local Division 1285, Amalgamated Transit Union, AFL/CIO/CLC,

Plaintiff,

vs.

Jackson Transit Authority, The City of Jackson, William T. Coleman, Jr., Secretary of Transportation, and William J. Usery, Secretary of Labor, United States Department of Labor,

Defendants.

MEMORANDUM IN OPPOSITION TO THE MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT OF THE FEDERAL DEFENDANTS

Filed 3/25/77

Statement of the Case

Plaintiff is the duly designated collective bargaining representative of the employees of the Jackson Transit Authority. Plaintiff has brought this action against, *inter alia*, William T. Coleman, Jr., Secretary of Transportation, United States Department of Transportation and W. J. Usery, Jr., Secretary of Labor, United States Department of Labor, to compel them to fulfill their duties to enforce the Urban Mass Transportation Act, 49 U.S.C. 1601 *et seq.* (The "UMTA"). The UMTA is an act "to authorize the Secretary of Transportation to provide additional assistance for the development of comprehensive and coordinated mass transportation systems, both public and private,

in metropolitan and other urban areas, and for other purposes." Title, Urban Mass Transportation Act of 1964. Under § 1602(a)(1) of the UMTA, "the Secretary is authorized, in accordance with the provisions of this Act and on such terms and conditions as he may prescribe to make grants or loans (directly, through the purchase of securities or equipment trust certificates, or otherwise) to assist States and local public bodies and agencies thereof in financing [various mass transportation undertakings]." As originally enacted, the "Secretary" was the Administrator of the Housing and Home Finance Agency (later The Department of Housing And Urban Development). The Reorganization Plan No. 2 of 1968, transferred these functions, for all purposes pertinent to this litigation, to the Secretary of Transportation. 49 C.F.R. § 1.50.

Section 13(c) of the Urban Mass Transportation Act of 1964 provides that:

> "(c) *It shall be a condition of any assistance under section 3 of this Act that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance.* Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(a)(f) of the Act of February 4, 1887 (24 Stat. 379), as amended the contract for the granting of

any such assistance shall specify the terms and conditions of the protective arrangements. 49 U.S.C. § 1609(c).

As more fully set fotth in Plaintiff's Memorandum In Opposition To The Motion To Dismiss By Defendants Jackson Transit Authority and the City of Jackson, this case originated in July 1966 when the City of Jackson applied for a grant under the provisions of the UMTA. Pursuant to Section 13(c) of the UMTA, Plaintiff Division 1285 and the Jackson Transit Authority entered into an agreement setting forth the protective arrangements required by the Act [Complaint, Exh. "C"]. On September 1, 1966 this agreement was certified by the Secretary of Labor as satisfactory under the provisions of 13(c), and the Urban Transportation Administration approved a grant to the City of Jackson [Complaint, ¶. 9].

In December 1975 the Jackson Transit Authority unilaterally abrogated the collective bargaining agreement, thereby also abrogating the 13(c) agreement which had guaranteed the continuance of employees' collective bargaining rights (including the rights to enter collective bargaining agreements and to arbitrate) [Complaint, ¶. 13 and Exh. "C"]. Thereafter, representatives of Division 1285 requested a determination by the Secretary of Labor that by these acts the Jackson Transit Authority and City of Jackson had breached their obligations. The Secretary of Labor failed to exercise his statutory duty to do so [Complaint, ¶. 22]. Neither the Secretary of Labor nor the Secretary of Transportation has taken any steps to enforce the Act [Complaint, ¶s 21 and 22]. Most recently, in a letter dated December 14, 1976 from Bernard E. DeLury, Assistant Secretary of Labor, The Department of Labor informed the Plaintiff that its response to the Plaintiff's request to enforce the Act was limited to its answer in the instant case. (A copy of the letter from the Assistant Secretary of Labor DeLury to Dan V. Maroney, International President, Amalgamated Transit Union, is attached to this memorandum as Exhibit "A" and made a part hereof). In their memorandum in support of the Federal

Defendants' Motion to Dismiss or In The Alternative for Summary Judgment the Federal Defendants appear to be contending that no member of the Federal Government has any obligation to enforce the Urban Mass Transit Act.

ARGUMENT

A. The Secretary of Transportation Has Failed To Fulfill His Obligation To Enforce The UMTA.

In the Memorandum in Support of Defendants' Motions on behalf of the Secretary of Transportation, Defendant Coleman contends this Court lacks jurisdiction over this action, because he is not obliged to enforce the provisions of Section 13(c). Secretary Coleman contends that the obligation of the United States is limited to the requirement that the Secretary of Labor determine whether the applicant for assistance has made adequate arrangements to protect the interests of the affected employees. (Defts.' Memo., pp. 7-9).

Defendant's position fundamentally misunderstands the wording and the history of the Act. It is true that under Section 13(c) of the UMTA the Secretary of Labor must determine that fair and equitable arrangements are made to protect the interests of employees as a condition of any assistance. This is not an action challenging the determination by the Secretary of Labor that the original arrangements were adequate under the Act. Plaintiff acknowledges that the initial determination by the Secretary of Labor approving the 13(c) arrangements in this case was correct.[1] However Defendant Coleman further contends that Congress' deliberate selection of the Secretary of Labor to make this initial determination means that the Secretary of Transportation is thereby permanently ex-

[1] Thus, Defendants' citation to the case of *Kendler v. Wirtz*, 388 F.2d 381 (3rd Cir. 1968), holding that the Secretary of Labor is vested with unreviewable discretion to determine what constitutes fair and equitable arrangements is entirely inapposite in this action. Plaintiff does not contend that the original determination by the Secretary of Labor was in any way less than adequate.

cluded from all responsibility. Defendant relies heavily on Congress' selection of the Secretary of Labor to make the initial determination under § 13(c). However, the legislative history of the UMTA reveals that the Congress' choice of the Secretary of Labor resulted from Congress' determination that the Secretary of Labor was the appropriate person to make the substantive determination of whether or not particular arrangements were adequate. 110 Cong. Rec. 14976-79, 14985-92 (1964). Plaintiff does not contest that the Secretary of Labor plays an ongoing role in determinations relating to obligations under 13(c). See pp. 10-12, *infra*. As more fully set forth in the Affidavit of Earle Putnam, General Counsel of the Amalgamated Transit Union (A copy of the Affidavit is attached to this Memorandum), since the program began 1964, the Department of Labor has acted after the grants are made to resolve particular factual and legal questions involved in ongoing compliance with the provisions of § 13(c). However, once the 13(c) arrangements are certified by the Secretary of Labor they also become a condition of assistance under the UMTA and a part of the grant contract, under Section 13(c). Under Section 1602 of the UMTA "the Secretary [of transportation][2] is authorized, *in accordance with the provisions of this Act* and on such terms and conditions as he may prescribe to make grants or loans . . .". 49 U.S.C. § 1602. (emphasis added). Thus, Congress clearly contemplated that the Secretary of Transportation would undertake urban mass transit assistance only in accordance with the provisions of the UMTA, including the obligation to protect the interests of employees affected by such assistance and that such protections are a part of the ongoing relationship as well as the initial certification. Thus, ultimately, Section 13(c) — like the rest of the UMTA — is part of the UMTA, and the Secretary of Transportation is also responsible for enforcing the provisions of the UMTA. 49 U.S.C. § 1602(a)(1). The legislative history of the UMTA, § 1608(e) on which Defendant relies, make this quite clear. Section 1608(e), provides:

[2] No one contests that § 1602 refers to the Secretary of Transportation.

> None of the provisions of this Act shall be construed to authorize the Secretary to regulate in any manner the mode of operation of any mass transportation system with respect to which a grant is made under section 3 or, after such grant is made, to regulate the rates, fares, tolls, rentals, or other charges fixed or prescribed for such system by any local public or private transit agency; but nothing in this subsection shall prevent the Secretary from taking such actions as may be necessary to require compliance by the agency or agencies involved with any undertaking furnished by such agency or agencies in connection with the application for the grant.

As the legislative history reveals, Section 1608(e) was inserted in the Act as a result of the fears of some members of Congress that the administrator, in his ongoing role as enforcer of the UMTA, would replace state utility commissions as the ratemaker for mass transit authorities. See, 110 Cong. Rec. 14975-5. However, Congress was careful to provide specifically that "nothing in this sub-section shall prevent the Secretary from taking such actions as may be necessary to require compliance by the agency or agencies involved with any undertaking furnished by such agency or agencies in connection with the application for the grant." Thus, although in § 1608(e) Congress precluded the Secretary from intruding into the role of the utility commissions, it acknowledged an exception to the restriction for actions necessary to enforce the Act.

Contrary to the Defendant's representations, the statutory language of § 1608 says nothing about secretarial discretion not to enforce the UMTA. Section 1608(e) speaks of "actions as may be necessary", to require compliance. It is well settled law that this Court's jurisdiction to review administrative action may be defeated only by a showing of 'clear and convincing evidence of a . . . legislative intent to restrict access to judicial review' by committing action to agency discretion. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 409, 412 (1971),

citing *Abbott Laboratories v. Gardner* 387 U.S. 136, 141 87 S. Ct. 1507, 1511, 18 L. Ed. 2d 681 (1967) and *Brown et v. We Shung*, 352 U.S. 180, 185, 77 S. Ct. 252, 255-256, 1 L. Ed. 2d 225 (1956). In sum, far from being an acknowledgement of the Secretary's freedom to disregard the enforcement of the grant commitment required by the UMTA, Section 1608(e) recognizes that the Secretary will take the actions necessary to require such compliance. Significantly, for this reason, Representative Taft opposed the provisions of Section 13(c), because he recognized that "the arrangements aprpoved by the Secretary of Labor will be crystallized firmly under the law." 110 Cong. Rec. at 14978. Thus, under the statutory scheme, the Secretary of Labor has the discretion to determine what arrangements are required. Thereafter, the arrangements become a part of the grant commitment required by the Act and the Secretary of Transportation is authorized to act only in accordance with the provisions of the law. § 1602(a)(1).

McDonald v. Stockton Metropolitan Transit District, 36 Cal. App. 3rd 436, 111 Cal. Reptr. 637, 640 (1973) (Defts.' Memo., p. 10), is not to the contrary. Most significantly, the plaintiffs were not suing to enforce the Act itself, and they did not sue the federal defendants herein. In *McDonald*, the residents of an area that was the recipient of an UMTA grant sued the transit district to oblige it to construct some bus shelters, which had been an obligation under the grant contract. The Court held that the private citizens had no standing to enforce a contract under the UMTA against the transit district. The Court ruled that the bus users are not the primary obligees of grant contracts under the UMTA; rather, the Court held, the federal government is the primary obligee. Interestingly, in *McDonald*, the Court noted that the officials of the federal government have many remedies — including suits for injunctive relief or damages to enforce the Act. Finally, the *McDonald* case was clouded somewhat by the fact that the Department of Transportation had simply done nothing to enforce the contract; there was no indication as in this action (see, Exhibit "A") of a refusal to enforce.

Plaintiff herein, unlike the users trying to enforce the contract in *McDonald*, does have standing to enforce the UMTA. Recently, in *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court specified the factors to be considered by a court in determining whether a private remedy is implicit in a federal statute:

> First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted' . . ., (citation omitted, emphasis supplied by Supreme Court) . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? (Citation omitted.) Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? (Citation omitted.) And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?

As more fully set forth in Plaintiff's Memorandum in Opposition to the Motion to Dismiss of Defendants Jackson Transit Authority, et al, these Plaintiffs are aggrieved by an injury in fact, and the injury falls within the zone of interests intended to be protected by the statutory scheme. Even a brief glance at the legislative history of the Act indicates that it is the employees whom the Congress intended to protect in Section 1609(c):

> The status quo must be preserved with respect to the employer-employee relationship. The relationship to the successor employer under federally assisted projects under the bill would be the same as his predecessor . . . in my judgment we cannot justify as a matter of public policy the use of federal dollars by a local community or governmental unit thereof to be spent for development of a transit system, the expenditure of which would result in worsening the present collective bargaining rights of free labor which operates that transit system. (109 Congressional Record 5671 and 5676).

Finally as the members of Congress repeatedly recognized throughout the debate on Section 13(c), labor arrangements are traditionally a matter of federal concern. Indeed, 13(c) was originally enacted in large measure to prevent employees who had enjoyed the protection of the federal National Labor Relations Act, 29 U.S.C. § 185 *et seq.*, from losing their collective bargaining rights when a public body used UMTA money to purchase a private company (thereby placing the employees in the status of public employees beyond the jurisdiction of the National Labor Relations Act). 109 Cong. Rec. 5661, 5669, 5678, 5681. Thus, there can be no doubt that these employees have standing to enforce the UMTA and to bring this action to compel the Secretary of Transportation to take the actions necessary to enforce the statutory obligations on the basis of which the UMTA grant to Defendant City of Jackson was originally made.

B. The Defendants JTA and the City of Jackson Refuse to Comply with the Arbitration Provisions of the 13(c) Agreement.

In their Memorandum, Federal Defendants contend that any relief in this action would violate the provisions of the 13(c) agreement requiring the parties to go to arbitration in the event of a dispute. However, as set forth in Plaintiff's Complaint, requesting, among other things, that Defendants City of Jackson and the Jackson Transit Authority ("JTA") be ordered to proceed to arbitration, Defendants Jackson and JTA have refused to comply with any of their obligations under the 13(c) agreement, including the obligation to arbitrate. As set forth in Exhibit "F" to Plaintiff's Complaint, the JTA is demanding negotiations for a new collective bargaining agreement, not arbitration of disputes arising under the existing contract. Thus, Defendants' contention that Secretary Coleman's enforcement of the UMTA would interfere with an arbitration mechanism is based upon a mistaken understanding of the operative facts in this action. Having agreed to arbitrate their labor disputes as a condition of the receipt of federal monies under UMTA,

Defendants Jackson Transit Authority and the City of Jackson now refuse to do so. That is why Plaintiffs have requested an order to proceed to arbitration as part of the relief in this action.

C. The Secretary of Labor is Obliged to Insure Compliance with the 13(c) Agreement.

Under Section 13(c), "it shall be a condition of any assistance under Section 3 of this Act that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance." Under the formulation of the Federal Defendants, neither the Secretary of Transportation nor the Secretary of Labor has any ongoing obligation under this statute, once the original grant application is approved. This is obviously preposterous. No arrangements, however protective and equitable, can fulfill this statutory requirement if they are nothing more than a sham, to be inserted in a grant application and thereafter ignored with impunity. In the first section of their memorandum, Defendants contend that Secretary Coleman has no obligation to insure that the equitable arrangements are carried out, because that obligation has been alloted to the Secretary of Labor (Defts.' Memo., pp. 7-9). Then, in the last part of their Memorandum, Defendants contend that the Secretary of Labor has no obligation beyond the initial certification, because the Secretary of Labor is not a party to the 13(c) Agreement.[3] Clearly, Congress intended that recipients of Federal UMTA grants could not say anything required to obtain federal money and then abandon their obligations.

Nothing in the Section establishing the Secretary of Labor's obligations to insure that fair and equitable arrangements are made ends with the signing of the grant

[3] The Secretary of Transportation is a party to the grant contract of which the 13(c) Agreement is a mandatory condition precedent. However, Defendants have already contended that Secretary Coleman has no obligation, because the Secretary of Labor is responsible for § 13(c).

contract. Under § 13(c), the Secretary of Labor has a special obligation to insure that his requirements, once established, are satisfied, and these Plaintiffs have standing to require such enforcement of his duty. The Secretary of Labor has consistently recognized this obligation. Since the enactment of § 13(c), the Department of Labor has received complaints by non-compliance (Putnam Aff., ¶), investigated (Putnam Aff., ¶), and engaged in all manner of enforcement ranging from conciliation (Putnam Aff., ¶) to the denial of funds (Putnam Aff., ¶). Although the specific determinations are made by the Secretary in such case, his unbroken course of conduct since 1964 illustrates that he is not free totally to ignore the abrogation of the 13(c) arrangements.

Thus, both the Secretary of Transportation and the Secretary of Labor have the obligation to enforce 13(c), and certainly the Federal Defendants may not each avoid his obligation by pushing Plaintiff off onto the other and watching Plaintiff fall into a crack between them.

WHEREFORE, Plaintiff respectfully requests this Court for an order denying the motions of Defendants Coleman & Usery.

Respectfully submitted,

MARTIN J. BURNS,
LINDA R. HIRSHMAN,

By: _____

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In The United States District Court
for The Western District of Tennessee
Eastern Division

Civil Action No. 76-104E

Local Division of 1285, Amalgamated Transit Union AFL/CIO/CLC,

Plaintiff,

vs.

Jackson Transit Authority, the City of Jackson, William T. Coleman, Jr., Secretary of Transportation, and William J. Usery, Secretary of Labor, United States Department of Labor,

Defendants.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BY JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON

Filed 4/19/77

Defendants Jackson Transit Authority and The City of Jackson, Tennessee hereby supplement the Memorandum heretofore filed in support of their Motion to Dismiss. All terms defined in such Memorandum shall have the same meaning herein.

1. *Federal Question Jurisdiction.* Plaintiffs contend that defendants JTA and the City have violated the Labor Agreement and that by doing so they have breached the 13(c) Agreement. They further contend that a violation of the 13(c) Agreement is tantamount to a violation of the UTMA, and, therefore, this action arises under the laws of the United States giving this Court Federal Question jurisdiction.

In support of this position, plaintiffs rely upon *Bradford School Bus Transit, Inc., et al, v. Chicago Transit Authority, et al*, 537 F.2d 943 (7th Cir. 1976) and *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2nd Cir. 1968). It is submitted that neither *Bradford* nor *Norwalk CORE* stand for such a proposition and are, therefore, inapposite. In both cases the Court was concerned with a question of "standing". We are here concerned with a question of subject matter jurisdiction, a totally different concept from "standing". In neither *Bradford* nor *Norwalk CORE* was the Court concerned with jurisdiction, and a reading of those cases makes it clear that jurisdiction was present in each case on one or more grounds. The Court in each case was concerned with the right of the plaintiff to complain with respect to the matters alleged in the complaint. No one here questions the right of the plaintiffs to complain, if, indeed, the 13(c) Agreement nor the Labor Agreement have been violated.

The leading case the subject of Federal Question jurisdiction is *Gully v. First National Bank in Meridian*, 57 S. Ct. 96, 299 U.S. 109, 81 L. Ed. 70 (1936). Justice Cardozo's definitive statement of the test of whether a claim "arises under" the laws of the United States is as follows:

> "To bring a case within the statute, a right or an immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. (Cases cited) The right of immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." S. Ct. p. 97.

Defendants JTA and the City submit that the enforceability of both the Labor Agreement and the 13(c) Agreement, if they have been breached, can be determined without reference to the UTMA. Under *Gully*, in order for Federal Question jurisdiction to exist, the Federal law must be a direct element in the plaintiff's claim, and it is

not enough that it comes into play remotely or indirectly. Jurisdiction does not attach on a bare assertion that an act of Congress is infringed and facts must be alleged to show that Federal law creates a duty or remedy in the particular case. *Russo v. Kirby*, 453 F.2d 548 (2nd Cir. 1971).

A suit between private parties on a contract does not raise a Federal Question merely because the contract was authorized, permitted, or required by Federal law. *Chicago and N.W. Ry. Co. v. Toldeo P. & W. R. Co.*, 324 F.2d 936 (7th Cir. 1963); *Suggs v. Brotherhood of Locomotive Firemen and Enginemen*, 219 F. Supp. 770 (D.C. Ga. 1963); *Burgos v. Watermen S.S. Corp. of Puerto Rico*, 189 F. Supp. 683 (D.C. Puerto Rico 1960).

Defendants JTA and the City, therefore, continue to insist that there is no Federal Question jurisdiction as to them in this case.

2. *Pendant Jurisdiction.* Plaintiffs contend that the Supreme Court decision in *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966), which broadened the rule of pendant jurisdiction as set down in *Hurn v. Oursler*, 289 U.S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 (1933), in effect does away with the requirement under the *Hurn* rule, and the cases which followed it, that both the federal and non-federal claims must be asserted against the same party, thus opening the door to "pendant party" jurisdiction. Such is not the case.

Gibbs did not involve a "pendant party" situation and must be confined to its facts which related only to pendant claims. It is true that some appellate court decisions since *Gibbs* have interpreted that case to authorize "pendant party" jurisdiction, but the Supreme Court refrained from deciding that question (See, *Moor v. County of Alameda*, 411 U.S. 693, 93 S. Ct. 1785, 36 L. Ed. 2d 596 (1973)) until the case of *Aldinger v. Howard*, ___ U.S. ___, 96 S. Ct. ___, 49 L. Ed. 2d 276, which was decided in the summer of 1976 and was still in the slip when the first memoran-

dum of the JTA and the City was filed in this case. In *Aldinger* the Supreme Court said that that case presented the "subtle and complex question with far reaching implications" to which it referred but did not decide in *Moor*. In *Aldinger* a discharged County employee brought suit against the Treasurer, the County, and other County officials in the Federal District Court claiming that her federal constitutional rights were violated by her discharge. Jurisdiction over the federal claim was asserted under 28 U.S.C. § 1343(3) which gives federal courts jurisdiction over "any civil action authorized by law to be commenced by any person" to redress the depriviation, under color of State law, of federal constitutional rights, and pendant jurisdiction was alleged to lie over a State law claim against the County. The District Court dismissed the claim against the County. The Ninth Circuit affirmed, 513 F.2d 1257. On certiorari the United States Supreme Court affirmed the Ninth Circuit in holding that there was no jurisdiction in the claim against the defendant County. The Court stated that it decided only the issue of so-called "pendant party" jurisdiction with respect to a claim brought under the statutes involved in that case, and it indicated that in other cases the result might be different. The Court declined to lay down any general rule upon the existence or exercise of "pendant party" jurisdiction, but stated that the following observations were sufficient:

> "If the new party sought to be impleaded is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the existence of pendant jurisdiction than if parties already before the court are required to litigate a state law claim. Before it can be concluded that such jurisdiction exists, a federal court must satisfy itself not only that Art. III permits it, but that Congress and the statutes conferring jurisdiction has not expressly or by implication negated its existence." L. Ed. p. 289.

Thus, contrary to plaintiff's contentions, "pendant party" jurisdiction has yet to be decreed by the Supreme

Court and each case must be examined separately. The Court did indicate that where, as here, the so-called "pendant party" is not otherwise subject to federal jurisdiction, there is a serious obstacle to the exercise of pendant jurisdiction. In addition, the District Court must satisfy itself that the case must be one which arises under the Constitution or laws of the United States and the statute conferring legitimate federal jurisdiction in the case has not either expressly or by implication negated "pendant party" jurisdiction. Plaintiff, of necessity, relies upon the UTMA as a basis for federal jurisdiction against the federal defendants in the case. Those defendants, as do we, contend that the UTMA does not afford a basis for federal court jurisdiction against them on the ground that the UTMA is merely collateral in this case. The UTMA creates no right of action and certainly does not provide for any remedy against the respective Secretaries. The plaintiff's claim arises under the 13(c) Agreement and/or the Labor Agreement, not the UTMA. The defendants JTA and the City contend that not by the broadest stretch of the imagination does the UTMA either expressly or by implication contemplate that it should afford the basis for federal court jurisdiction over parties such as the JTA and the City on purely state claims where it is alleged that the respective Secretaries have not discharged their responsibilities under the UTMA.

These defendants, therefore, continue to maintain that there is no basis for the exercise of pendant jurisdiction over them in this case.

Respectfully submitted,

SIDNEY W. SPRAGINS,
Assistant City Attorney
P. O. Box 2004
Elks Building
Jackson, Tennessee 38301

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing has been delivered to counsel for all parties on this the 19th day of April, 1977.

SIDNEY W. SPRAGINS

In The United States District Court
For the Western District of Tennessee
Eastern Division

Civil Action No. 76-104E

Local Division of 1285, Amalgamated Transit Union AFL/CIO/CLC,

Plaintiff,

vs.

Jackson Transit Authority, The City of Jackson, William T. Coleman, Jr., Secretary of Transportation, and William J. Usery, Secretary of Labor, United States Department of Labor,

Defendants.

SUPPLEMENTAL MEMORANDUM IN RESPONSE TO THE MOTION TO DISMISS BY JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON

Filed 5/5/77

In their Supplemental Memorandum In Support of The Motion to Dismiss, Defendants Jackson Transit Authority and the City of Jackson raised three additional contentions. Defendants contend that Plaintiff's authorities of

Bradford School Bus Transit, Inc., et al., v. Chicago Transit Authority, et al., 537 F.2d 943 (7th Cir. 1976) and Norwalk *CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2nd Cir. 1968), are standing cases and do not concern federal subject matter jurisdiction. Second, Defendants contend that this action to enforce the 13(c) agreement does not raise a federal question. Third, Defendants reformulate their original contention that this Court does not have pendent jurisdiction over them by reference to the recent Supreme Court decision *Aldinger v. Howard*, 96 S. Ct. 2413 (1976).

Regarding Defendant's supplemental contention that *Bradford, supra,* and *Norwalk CORE, supra,* do not support Plaintiff's claims of federal jurisdiction over them, Defendants simply do not understand those precedents. In each of those cases, as in the instant case, Plaintiffs were attempting to enforce a federal statute that required the recipients of federal funds to make certain contracts. In each of those cases, once the Court found that the Plaintiffs had the standing to enforce the federal statute, as effectuated by the contract, federal question jurisdiction followed automatically under 28 U.S.C. § 1331. Accordingly, the Courts in *Bradford* and *Norwalk CORE* focused on the only issue in dispute — whether the Plaintiffs had standing to enforce the contracts effectuating the federal statute. In each case the Court found that it did and asserted jurisdiction.*

Further, throughout this action, Plaintiff has contended that this Court has jurisdiction under 28 U.S.C. § 1331, because the enforcement and interpretation of the agreement between Plaintiff and Defendant Jackson Transit Authority, as embodied in the grant contract between Jackson Transit Authority and the Urban Mass Transit Administration, also raises federal questions. By contrast to the authorities cited by Defendants at page two of their

* In January, 1977 the Court of Appeals for the Seventh Circuit ruled that handicapped plaintiffs had standing to enforce UMTA Regulations regarding access to mass transit for the handicapped. See. *Lloyd v. RTA*, 548 F.2d 1277 (7th Cir. 1977).

memorandum[1] the 13(c) agreement is not merely authorized or permitted by federal law — it is the designated means of effectuating the rights set forth in the statute [49 U.S.C. § 1609(c)]. The Urban Mass Transit Act mandates the establishment of arrangements to protect the employees from worsening of their employment conditions as a result of the federal grant and requires such arrangements to be included in the grant contract. Any construction of the contract embodying these arrangements is a construction of federal statutory obligations under § 13(c). To cite just one example, this Court's inquiry regarding the ongoing effect of the contractual obligation illustrates how closely the contractual arrangements are linked to the statutory rights. Should a Court rule that the contract does not mandate a particular interpretation, the Court would be determining what arrangements are required by § 13(c) of the statute as well. Unlike the entities in the cases cited by Plaintiff, the Jackson Transit Authority is not merely a body created by federal law and empowered to make contracts necessary for the ordinary course of business. The 13(c) agreement is the vehicle effectuating explicit federal statutory rights, and the Defendants are required by statute to make such agreements. Thus, each decision interpretating the agreement is a decision interpretating the statute, and federal question jurisdiction is present.

Finally, as Defendants themselves concede, the Supreme Court's decision in *Aldinger, supra*, is limited to the question of pendent jurisdiction under the Civil Rights Act, 42 U.S.C § 1983. Plaintiff of course contends that it has stated a federal cause of action against the Jackson Transit Authority and the City of Jackson, so that the "Jackson Defendants" are not parties pendent to a federal action directed at the Secretaries of Transportation and Labor. However, even assuming, *arguendo*, that this Court

[1] *Chicago and N.W. Ry. Co. v. Toledo P. & W. R. Co.*, 324 F.2d 936 (7th Cir. 1968); *Suggs v. Brotherhood of Locomotive Firemen and Enginemen*, 219 F. Supp. 770 (D.C. Ga. 1963); *Burgos v. Watermen S.S. Corp. of Puerto Rico*, 189 F. Supp. 683 (D.C. Puerto Rico 1960).

were to decide that Plaintiff's federal action is limited to an action against the Secretaries, the City of Jackson and the Jackson Transit Authority are still properly before this Court, and, under the analysis set forth in *Aldinger*, this case is appropriate for the exercise of pendant party jurisdiction.

Unlike the Civil Rights Act, nothing in the legislative history of the Urban Mass Transit Act precludes federal jurisdiction over these Defendants. Indeed, as more fully set forth in Plaintiff's original Memorandum in Opposition to the Motion to Dismiss, there is every indication in the legislative history that Congress intended to create a federal remedy against these actions by these defendants breaching all of their contractual obligations. Prior to the operative events in this case, these employees were employees of a private transportation company. They enjoyed federal jurisdiction under 29 U.S.C. § 185 over actions to enforce their collective bargaining agreements with their employer. Thus, when the legislators articulated their intent that the employees' rights be maintained after the creation of UMTA, they indicated a continued federal jurisdiction over the contractual relationships between the parties. Under the circumstances, where the federal defendants have failed to exercise their statutory obligations to enforce the Urban Mass Transit Act against these Defendants, all considerations of legislative intent and judicial economy indicate that Plaintiff's actions against the Jackson Transit Authority and the City of Jackson be resolved by this Court in exercise of its pendent jurisdiction.

WHEREFORE, Plaintiff respectfully requests this Court to deny the Motion of Defendant City of Jackson and the Jackson Transit Authority.

Respectfully submitted,

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Linda R. Hirshman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Tuesday, the 3rd day of May, 1977 I caused the foregoing Supplemental Memorandum in Response to the Motion to Dismiss by Jackson Transit Authority and the City of Jackson to be served by mailing copies thereof by first class mail, postage prepaid, to the following:

SIDNEY W. SPRAGINS, ESQ.,
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c/o Robert M. Williams, Jr., Esq.,
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1058 Federal Office Building,
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ANTHONY J. SABELLA, ESQ.,
100 N. Main Bldg.,
Memphis, Tennessee 38103,

LINDA R. HIRSHMAN

In The United States District Court
For the Western District of Tennessee
Eastern Division

Civil Action No. 76-104E

Local Division 1285, Amalgamated Transit Union, AFL/CIO/CLC,

Plaintiff,

vs.

Jackson Transit Authority, The City of Jackson, William T. Coleman, Jr., Secretary of Transportation, and William J. Usery, Secretary of Labor, United States Department of Labor,

Defendants.

MOTION TO ALTER OR AMEND JUDGMENT

Filed 1/3/78

Plaintiff, Local Division 1285, respectfully requests this Court, pursuant to Rule 59(e), Federal Rules of Civil Procedure, to reconsider its judgment dismissing the above-captioned action, on the grounds that:

1. This Court based its decision in part on an erroneous understanding of the status of a similar case pending before Judge Doyle, in the United States District Court for the Western District of Wisconsin. Counsel for Plaintiff requests the opportunity to present this Court with the actual status of the action in Wisconsin; and

2. This Court's decision is based on an interpretation of Plaintiff's authorities and analysis which was not addressed in oral argument before this Court. This situation

came about, because oral argument was held in April, 1977. In October, 1977, Judge Edmund Port ruled in a case cited by Defendants to the Court, and Plaintiff did not have the opportunity to answer the Court's questions about that decision. The Court's decision reflects substantial reliance on that decision, and Plaintiff requests the opportunity to address in oral argument this Court's understanding of that decision; and

3. This Court's opinion makes reference to the absence of an implied private action to enforce the federal statute, and no such implication is necessary when the private right of action enforcing the agreements automatically enforces the statute. The issue of implied rights of action was not raised at oral argument, and Plaintiff requests the opportunity to address the Court on that issue; and

4. This Court's opinion states that this action differs from the case of *Bradford School Bus Transit v. Chicago Transit Authority*, 537 F.2d 943 (7th Cir. 1976). It is not clear from this Court's opinion that this Court understood that Plaintiff's action herein was, *inter alia*, to enjoin the Secretary of Transportation to cease providing federal funds to Defendants in violation of § 1609(c) of the Act and for judgment that the Defendants Jackson Transit Authority and Jackson were in violation of the Act and their grant contract. Since this is the identical action brought by the Plaintiff in *Bradford*, Plaintiff requests the Court to take further oral argument regarding these points.

Plaintiff respectfully requests this Court to reconsider its opinion dismissing this case pending the filing of briefs and setting of oral argument on the additional points raised in this Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Friday, the 29th day of December, 1977, I caused the foregoing Motion to Alter or Amend Judgment to be served by mailing copies thereof by first class mail, postage prepaid, to the following:

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LINDA R. HIRSHMAN

In The United States District Court
for The Western District of Tennessee
Eastern Division

No. C-76-104-E

Local Division 1285, Amalgamated Transit Union, AFL/CIO/CLC,

Plaintiff,

v.

Jackson Transit Authority, et al.,

Defendants.

ORDER

Filed 2/23/78

Following entry of an Order sustaining defendants' motion to dismiss for the reasons stated in the December 23, 1977, Memorandum Opinion, plaintiff's counsel has filed a motion to amend or to alter the Judgment. Plaintiff's counsel has filed a thoughtful and thorough memorandum and supplemental memorandum in support of its motion seeking relief in the federal forum rather than pursuing what appears to be an adequate remedy in a contract action in state court. The emphasis has been for reconsideration of the Court's action as to the City of Jackson and the Jackson Transit Authority, since plaintiff has cited no case supportive of its prayer for injunctive or mandamus action against the Secretary of Labor or the Secretary of Transportation.

In this regard, it should perhaps be re-emphasized that both Secretaries have done what the UMTA required of them at the outset in order that a ten year old grant to the

City of Jackson be approved. It is further evident that absent their action, the plaintiff would have been confined to contractual rights against a failing private employer about to go out of business. These United States agencies, then, performed the service expected and within the statutory purpose of UMTA, to "protect the interests of employees affected by such assistance."

There is no demonstrated basis for the Court to compel these defendants to do what they have declined to do under advice of United States Attorneys charged with responsibilities to enforce the laws generally — and the UMTA in particular. The motion of plaintiff for reconsideration as to the respective departmental Secretaries is denied.

Passing to the merits of reconsideration of the dismissal of the claim against the municipality, the Court has studied carefully the further memoranda and argument submitted. Particularly, the Court has considered a later opinion of Judge Doyle of the United States District Court for the Western District of Wisconsin. Like Judge Doyle, this Court agrees that UMTA is not a regulatory statute — it rather represents an exercise of the federal spending power to deal with urban mass transit problems. It is not an act, like the Railway Labor Act, or the Interstate Commerce Commission Act, purporting to set out federal authority over employees in an industry or rule-making authority over interstate transportation. UMTA deals primarily with state and local agencies, municipal authorities whose concern is with local transportation problems. This Court, therefore, respectfully disagrees with the learned Wisconsin District Judge's conclusion that Railway Labor Act or Interstate Commerce Commission cases are analagous to the instant situation. This Court finds no "involved implication of a private remedy" to a labor organization arising out of alleged circumstances which have occurred more than ten years after the rights of plaintiff were recognized and protected, as required by UMTA at the time a grant of money was approved.

Again, like Judge Doyle,[1] this Court concludes that while *Bradford School Bus Transit v. Chicago Transit*, 537 F.2d 943 (7th Cir. 1976) and *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977) might or could be supportive of plaintiff's position, they are *not directly so*. The intendment of UMTA was only secondarily involved in protection of collective bargaining rights; Congress expressed itself to assure employees that existing rights and contracts would not be eliminated as a part of the initial grant process to municipalities; that the grants under the Act would "not be used in a manner that is detrimental to legitimate interests and rights of workers." U. S. Code, *Congressional and Administrative News*. Vo. 2, p. 2584, 1964. The United States representatives charged with this responsibility have acted to carry out this responsibility; they properly have not acted to involve themselves in continuous controversies between private (or public) parties to a contract approved by them.

This Court is persuaded that Congress is the appropriate body to determine clearly whether it is national policy for federal courts to become involved in local labor disputes which happen to be within an urban transit area. Congress has not indicated such a policy in UMTA; plaintiff asserts no claim of constitutional concern such as race or sex discrimination or freedom of speech. Compare *Cannon v. University of Chicago*, No. 76-1239 (7th Cir. 1977).

The Court has also carefully considered the implications of *McDaniel v. University of Chicago*, 512 F.2d 583 (7th Cir. 1975) *vacated and remanded*, 423 U.S. 810 (1975), 548 F.2d 689 (7th Cir. 1977) *cert. den.* (1978), but this Court finds that plaintiff has not met all the requirements of

[1] Judge Doyle's decision on this issue is the only one of four District Court decisions upholding contentions similar to plaintiff in this case. See *Div. 580, ATU v. Central N.Y. Regional Transportation Authority*, No. 77-Cv-45 (N.D.N.Y. 1977) and *Transit Authority of Louisville v. Amalgamated Transit Union*, No. C-76-0535-L (N.D. Ky. 4/20/77). This and the two others have been decided in favor of the defendants.

Cort v. Ash, 422 U.S. 66 (1975), that there was any demonstrated legislative intent to create a private federal remedy for plaintiffs or labor organizations such as plaintiff. This is a cause of action traditionally relegated to state law, unless preempted by a federal statute or agency, such as NLRA or NLRB. If it were otherwise indicated that the state law failed to provide any remedy, such as the sought for arbitration, then as a matter of equity, a federal court might consider the case in a different light. For the reasons indicated in the December 23, 1977 Opinion, however, this is not a consideration here. UMTA was not enacted, in this Court's judgment, for the special benefit of labor organizations such as Local No. 1285 under the circumstances here alleged. See *National League of Cities v. Usery*, 426 U.S. 833 (1976) and *Local Div. 714, ATU v. Greater Portland Transit District*, Civ. No. 77-54 S.D. (D. Maine, 1/11/78).

The Court accordingly overrules the motion to amend or alter its Judgment.

This 23rd day of February, 1978.

HARRY W. WELLFORD, JUDGE,
United States District Court.

Opposition

No. 81-411

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE,

Petitioners,

v.

LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred in finding federal jurisdiction over Plaintiff's action to enforce the mandate of § 13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 1609(c), and the labor protective agreements concluded between the parties and certified by the United States Secretary of Labor pursuant thereto.

INDEX

	Page
STATEMENT OF CASE	2
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. The Courts Below Have Unanimously Ruled Federal Jurisdiction Exists And Plaintiff States A Claim	9
II. There Is No Dispute Of Substance Here	13
III. This Decision Not In Conflict With This Court's Decisions	17
A. The *Cort* Analysis Should Not Apply At All	17
B. The Court Of Appeals Decision Is In Accord With This Court's Ruling Regarding The Interstate Commerce Act	18
C. The Outcome Here Accords With This Court's Decision in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*	20
IV. Petitioner's Other Contentions Are Equally Ill-Founded	22
V. Alternative Grounds For Denial Of Certiorari	29
CONCLUSION	30

APPENDIX PAGE

Opinion of the United States Court of Appeals for the Sixth Circuit, *Division 1235* v. *Metropolitan*, etc., No. 79-1511 ..... A1

Opinion of the Unted States District Court for the Western District of Kentucky, *Division 1447* v. *Louisville*, etc., No. C 79-0629L(A) B1

Opinion of the United States Court of Appeals for the Sixth Circuit, *Division 1447 v. Louisville*, etc., No. 80-3203 ..... C1

Opinion of the United States District Court for the Western District of Michigan, *Local Division 1039* v. *Capital*, etc., No. G81-200LA D1

Opinion of the United States Court of Appeals for the First Circuit in *Local Division 589* v. *Commonwealth*, etc., Nos. 81-1180, (10/23/81) F1

TABLE OF AUTHORITIES

CASES: PAGE

Adickes v. *Kress*, 398 U.S. 144 (1970) 29

Bell v. *Hood*, 327 U.S. 678 (1946) 4

Brotherhood of Locomotive Engineers v. *Chicago & Northwestern*, 314 F. 2d 424 (8th Cir. 1963) 18

Burlington Northern, Inc. v. *American Railway Supervisors Ass'n.*, 503 F. 2d 58 (7th Cir. 1974) 18

Cannon v. *University of Chicago*, —— U.S. ——, 99 S.Ct. 1946 (1979) 17, 20

CASES: PAGE

City of Macon v. *Marshall*, 439 F. Supp. 1209 (M.D. Ga. 1978) 26

Cort v. *Ash*, 422 U.S. 66 (1975) 13, 17, 18, 20

County of Los Angeles v. *Adams*, 574 F. 2d 607 (D.C. Cir. 1978) 26

Dade County v. *Amalgamated*, 157 So. 2d. 176 (Fla. 1963) 8, 13

Divisions 174 and 1037 v. *Southeastern Regional Transportation Auth., et al.*, No. 80-2427-S (D. Mass. 1981) 7, 13, 16

Division 276 v. *Stockton Metropolitan Transit District*, No. 146157 (Sup. Court of Cal.) 7

Division 519 v. *LaCrosse*, 445 F. Supp. 798 (W.D. Wis. 1977) (preliminary injunction issued); *affirmed*, 585 F. 2d 1340 (7th Cir. 1978) .....passim

Division 587 v. *Municipality of Metropolitan Seattle*, No. C80-1227M (W.D. Wash., 1980), *stay denied*, No. 80-3532 (9th Cir. 1/16/80) (appeal pending)...6, 13

Division 589 v. *Massachusetts Bay Trans. Auth.*, 511 F. Supp. 312 (D. Mass. 1981) *rev'd on other grounds*, ——F. 2d ——, Nos. 81-1180, 81-1198 and 81-1219 (1st Cir. 9/30/81) *mod on reh.*, 10/23/81 .....7, 12

Division 714 v. *Portland*, 589 F. 2d 1 (1st Cir. 1978).passim

Division 732 v. *Metropolitan Atlanta Rapid Transit Authority*, No. 81-1242A (N.D. Ga.) (appeal pending No. 81-7613, 11th Cir.) 7, 16, 28

CASES: PAGE

Division 1039 v. *Capital Area Transportation Authority*, No. G-81-200 (W.D. Mich. 9/23/81) 7, 21

Division 1177 v. *Tidewater Transportation District Commission, et al.*, No. 79-968-N (E.D. Va.) 6, 16

Division 1212 v. *Chattanooga Area Regional Transportation Authority*, No. CIV-1-79-212 (E.D. Tenn.) 6, 13, 16

Division 1235 v. *Metropolitan Transit Authority, ATE Management & Service Co., Transportation Management of Tennessee, Inc.*, No. 80-3452 (6th Cir. 6/3/81) 6, 13

Division 1235 v. *Metropolitan Transit Authority, ATE Management & Service Co., Transportatoin Management of Tennessee, Inc.*, No. 80-3452 (M.D. Tenn. 10/16/80) (appeal pending, No. 80-5397) 7

Division 1287 v. *Kansas City Area Transportation Authority*, 582 F. 2d 444 (8th Cir. 1978), *cert. den.*, 99 S.Ct. 872 (1979) 6, 10, 11

Division 1287 v. *Kansas City Area Transportation Authority*, No. 77-0663-W-2 (W.D. Mo. 1980)...7, 13, 15

Division 1309 v. *San Diego Transit Corporation*, No. 78-1093-E (S.D. Ca.) 6, 15

Division 1447 v. *Louisville and Jefferson County Transit Authority, etc.*, No. 80-3203 (6th Cir. 7/28/81) ..6, 11, 13

Division 1571 v. *Golden Gate Bridge Highway and Transportation District*, No. C-79-2278 (N.D. Cal. 1980) 7

CASES: PAGE

Dopico v. *Goldschmidt*, No. 80 CIV 4562 (S.D.N.Y. July 24, 1981) 20, 24

Dupler v. *City of Portland*, 421 F. Supp. 1314, 1320 & n. 8 (D. Me. 1976) 26

Employees Protective Association v. *Norfolk & Western*, 511 F. 2d 1040, *aff'd. on remand*, 571 F. 2d 195 (4th Cir. 1979) 18

Florida Dept. of Health & Rehabilitation Service v. *Califano*, 449 F. Supp. 274, 283-84 (N.D. Fla.), *aff'd mem.*, 585 F. 2d 150 (5th Cir. 1978), *cert. denied*, 441 U.S. 931 (1979) 26

Florida East Coast Railway Co. v. *Jacksonville Terminal*, 328 F. 2d 720 (5th Cir. 1964) 19

International Association of Machinists v. *Central Airlines*, 372 U.S. 682 (1963) 8, 19

Local 192 v. *Alameda-Contra Costa Transit District*, No. 513665-4 (Sup. Court of Cal.) 7

Local Division 580 v. *CENTRO*, No. 77-CV-45 (Op. of Judge MacMahon, 2/9/77, *aff'd.*, 556 F. 2d 659 (2nd Cir. 1977); *dism'd. on rem.*, No. 77-CV-45 (N.D. N.Y. 10/19/77); *Op. vacated as moot*, 578 F. 2d 29 (2nd Cir. 1978) 4, 14, 15, 28

Local Division 1285 v. *Jackson Transit Authority*, 447 F. Supp. 88 (W.D. Tenn. 1977); *rev'd*, No. 78-1185 (6th Cir. 6/3/81) 13, 17, 21, 23

Lorillard v. *Pons*, 434 U.S. 575, 580 (1978) 20

CASES: PAGE

Maine v. *Thiboutot*, 100 S. Ct. 2502 (1980) 29

Middlesex County Sewerage Authority v. *National Sea Clammers*, —— U.S. ——, 101 S.Ct. 2615 (1981) .. 29

National League of Cities v. *Usery*, 426 U.S. 883 (1976) 25, 26

Norfolk & Western Rwy. Co., v. *Nemitz*, 404 U.S. 37 (1971) 7, 18

North Carolina ex rel. Morrow v. *Califano*, 445 F. Supp. 532, 536 7 N. 10 (E.D. N.C. 1977) (three judge court), *aff'd. mem.*, 435 U.S. 962 (1978) 26

St. Louis Southwestern Railway v. *City of Tyler, Texas*, 375 F. 2d 938 (5th Cir. 1967) 19

State of New Hampshire v. *Marshall*, 616 F. 2d 240, 245 (1st Cir. 1980), *appeal dismissed*, —— U.S. ——, 101 S.Ct. 53 26

State of Oklahoma v. *Schweiker*, —— F. 2d ——, No. 80-1004, (D.C. Cir. 6/18/81) 26

Testa v. *Katt*, 320 U.S. 386 (1946) 10

Texas Landowners Rights Ass'n. v. *Harris*, 453 F. Supp. 1025 (D.C.C. 1978) 26

Transamerica Mortgage Advisors, Inc., v. *Lewis*, 444 U.S. 11 (1979) 9, 20, 21, 22

United Transportation Union v. *Long Island Rail Co.*, 634 F. 2d (1980), *cert. granted*, —— U.S. ——, 49 L.W. 3946 26

Statutes

PAGE

Civil Rights Act, 42 U.S.C. § 1983 29

Interstate Commerce Act, 49 U.S.C. § 11347 (formerly § 5(2)(f) .....passim

Investment Advisors Act, § 215 21

National Labor Relations Act, 29 U.S.C. § 151 *et seq.* 2, 9, 26, 27

Railway Labor Act, § 204 20

Urban Mass Transportation Act, 49 U.S.C. § 1609(c) .....passim

Miscellaneous

Hearings on S.6, Subcommittee on Housing of the Senate Comm. on Banking and Currency, 88th Cong., 1st Sess. (1963) 8, 13, 18, 19

Hearings on H.R. 3881, Before House Comm. on Banking and Currency, 88th Cong., 1st Sess. (1963) ..8, 13, 18

Senate Report No. 82, 88th Cong., 1st Sess. (1963)..3, 18, 25

109 Cong. Rec. 5322-5684 .....passim

1964 U.S. Code Cong. & Admin. News, 2569, 2950 13

Elkouri & Elkouri *How Arbitration Works*, (Ed. 1973) pp. 7, 12, n. 44 28

29 Code of Federal Regulations, § 215 3

IN THE

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OCTOBER TERM, 1981

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

Petitioners, Jackson Transit Authority and Jackson, Tennessee (hereinafter "Jackson"), request this Court to review the ruling of the United States Court of Appeals for the Sixth Circuit, reversing the District Court dismissal of this action for want of federal subject matter jurisdiction.

Section 13(c) of the Urban Mass Transportation Act (hereinafter "UMTA") provides that, as a condition of federal assistance under the Act, federal grant recipients must make fair and equitable arrangements, as determined by the Secretary of Labor, for the protection of their employees' interests. 49 U.S.C. § 1609(c) (hereinafter "§ 13(c)"). Such arrangements must include provisions necessary for the continuation of collective bargaining rights (§ 13(c) (2)) and the preservation of rights, privileges and benefits under existing collective bargaining agreements (§ 13(c) (1)).

From 1943 until 1966, Plaintiff, Division 1285, Amalgamated Transit Union, (hereinafter "Union") represented the employees of the private transit company operating in Jackson, Tennessee, under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* In 1966, Jackson created the Jackson Transit Authority to take over the formerly private transit operations. Jackson applied to the United States Urban Mass Transportation Administration for a federal grant under the UMTA in order to buy the essential capital equipment necessary to launch the public provision of transit services.

As set forth above, in such cases, § 13(c) of the UMTA provides that federal grant recipients must conclude fair and equitable labor protections for their employees. Congress provided that these arrangements would ordinarily be the product of local bargaining and negotiation. Sen.

Rep. No. 82, 88th Cong., 1st Sess., p. 28 (1963). Accordingly, after passage of the UMTA, the Secretary of Labor determined that fair and equitable labor protective arrangements required by the Act would be concluded by: (1) notifying the labor organization involved of a grant application; and (2) requiring the parties to negotiate a suitable agreement. 29 C.F.R. § 215.

Therefore, in Jackson, as in all UMTA grant applications where the employees are represented, the Union and employer involved negotiated an agreement setting forth the specifics of the fair and equitable arrangement the Act required (hereinafter the "Section 13(c) Agreement"). The § 13(c) Agreement included Defendant's commitment, as § 13(c)(2) of the Act requires, to continued collective bargaining rights, and a commitment, as § 13(c)(1) of the Act requires, to preserve rights, privileges and benefits. The Secretary then determined that the § 13(c) Agreement was a fair and equitable arrangement, as the Act requires, and certified to the Secretary of Transportation, as the Act requires, that such an agreement had been reached. 49 U.S.C. § 1602(e)(4). Jackson received its federal funds, and the public operation of transit in Jackson began.

From 1966 until 1975, Jackson continued to negotiate with the Union, and the basic collective bargaining agreement was amended several times. In 1975, a few months after conclusion of a collective bargaining agreement for the period 1975-1978, Jackson wrote to the Union, unilaterally declaring the recent collective bargaining agreement to be null and void.[1] Thereafter, Jackson refused to im-

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1. Jackson contended that the collective bargaining agreement—the fourth one negotiated by the transit system manager since 1966—was "personal" to the manager, who had resigned. Second, Jackson contended that the manager had failed to obtain proper authority for the collective bargaining agreements from the Board of Commissioners.

plement the provisions of the collective bargaining agreement and made numerous changes in existing conditions of employment.

The United States Secretary of Labor refused to examine Jackson's actions to determine whether Jackson had breached its labor protective agreement, which he had certified as fair and equitable. The Secretary of Transportation refused to take any action, contending that the statute merely required him to specify the § 13(c) Agreement in the grant contract, but that he has no interest in whether or not the recipient breached the agreement.

The Union sued Jackson to compel its compliance with the terms of the labor protective agreement effectuating § 13(c) of the UMTA and sued the Secretaries in an effort to compel them to take administrative action against Jackson. The District Court dismissed all Defendants for lack of federal jurisdiction.[2]

The Court of Appeals reversed in part, but affirmed the dismissal of the Secretaries. The Court ruled, first, that subject matter jurisdiction does not rest on the statement of a claim for implied private federal remedy. *Bell* v. *Hood*, 327 U.S. 678 (1946). The Court then set forth the traditional standard for the threshold question of jurisdiction:

> Our first determination, therefore, must be whether the Union's claim "arises under" the laws of the United States within the meaning of Section 1331. If it does, then federal jurisdiction obtains unless the

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2. The District Court opinion rested largely on two decisions, since reversed or discredited. See, *Division 714* v. *Portland*, 589 F. 2d 1 (1st Cir. 1978) and *Local Division 580, A.T.U.* v. *CENTRO*, No. 77-CV-45, (N.D. N.Y. 10/10/77) (hereinafter, *"Syracuse"*); *Op. vacated as moot*, 578 F. 2d 29 (2nd Cir. 1978). It also found that Plaintiff lacked standing (Petitioner's Appendix, pp. 25a-26a) (hereinafter "Pet. App."), and that the Court lacked jurisdiction, because Plaintiff might also be adequately protected by Tennessee law (Pet. App., pp. 28a-29a). Finally, the Court ruled that the statute created no enforcement role for either Secretary. (Pet. App., pp. 28a, 30a).

> claim is "immaterial," or "wholly insubstantial and frivolous," made "solely for the purpose of obtaining jurisdiction," *Id.* [*Bell* v. *Hood*, 327 U.S.] at 682. (Pet. App., p. 4a).

The Court concluded that the Plaintiff's action for breach of its § 13(c) Agreement arose under federal law. The Court noted that the federal statute required Defendant to execute labor protective arrangements, including, at a statutory minimum, that "employees would enjoy continued rights after their private employer becomes a public authority". (Pet App., p. 5a). The Court then turned to the question of whether Plaintiff stated a claim for enforcement of the § 13(c) Agreements effectuating federal law.

The Court noted first that the Court of Appeals for the Seventh Circuit had ruled three years ago that a Plaintiff's action enforcing its § 13(c) Agreements with another Defendant arose under federal law. That being so, the Seventh Circuit noted, the § 13(c) Agreement, a contract mechanism, is enforceable by the parties to it, just like any other contract.[3] Further analysis was therefore unnecessary. The Court went on to conclude that, necessary or not, an inquiry into whether the Plaintiff was impliedly entitled to enforce the protections of § 13(c) "reinforced [the Court's] conclusion that this action is properly in federal court". (Pet. App., p. 9a).

Noting this Court's restrained implication of private enforcement, and making explicit reference to the importance of legislative intent, as this Court requires, the Court of Appeals rested this second basis for reversal of the District Court order on the following grounds: (1) the inherent private enforceability of the legislatively mandated contract mechanism (Pet. App., p. 10a); (2) the absence of a

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3. The Court further noted that the Court of Appeals for the Seventh Circuit had concluded that it would be "fatuous" to suggest otherwise. (Pet. App., p. 8a).

mandate for any administrative enforcement responsibility of the Act or Agreements (Pet. App., p. 10a); (3) the long-standing federal nature of employee protective arrangements in transit.[4] (Pet. App., pp. 11a-13a) The Petition for *certiorari* followed.

SUMMARY OF ARGUMENT

There is no conflict in the Circuits about the issues presented by this Petition. To the contrary, since 1978, five panels of four United States Courts of Appeals have all ruled in conformity with the decision here (1) that jurisdiction exists and (2) that Plaintiff states a claim for enforcement of its agreement.[5] Judge Merritt's was the sole dissent.

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4. In thus finding that Plaintiff stated a claim, the Court of Appeals explicitly set forth this Court's "strict" standard and carefully analyzed the precedents in the unique historic context of transit labor protective arrangements. Even a cursory perusal of the opinion reflects how carefully the Court sought not to ignore this Court's "directives", as Petitioner groundlessly suggests. (Pet. for Cert., p. 7). See, also, pp. 6-7, n 5, *infra*, setting forth the almost twenty identical, recent rulings.

5. *Division 1287* v. *Kansas City Area Transportation Authority*, 582 F. 2d 444 (8th Cir. 1978), *cert. den.*, 99 S. Ct. 872 (1979) (*"Kansas City I"*); *Division 519* v. *LaCrosse*, 445 F. Supp. 798 (W.D. Wis. 1977 (preliminary Injunction issued), *affirmed*, 585 F. 2d 1340 (7th Cir. 1978) (*"LaCrosse"*); *Portland, supra; Local Division 1285* v. *Jackson Transit Authority*, 447 F. Supp. 88 (W.D. Tenn. 1977), *rev'd.* No. 78-1185 (6th Cir. 6/3/81) (*"Jackson"*); *Division 1235* v. *Metropolitan Transit Authority, ATE Management & Service Co., Transportation Management of Tennessee, Inc.*, No. 80-3452 (6th Cir. 6/3/81) (*"Nashville"*); *Division 1447* v. *Louisville and Jefferson County Transit Authority, etc.*, No. 80-3203 (6th Cir. 7/28/81) (*"TARC I"*). (*TARC I* was decided by a different panel of the United States Court of Appeals than decided this case). (*Nashville, supra* and *TARC I, supra*, are reproduced in Respondent's Appendix, pp. A1 and B1 (hereinafter, "Resp. App.").)

The District Courts are equally unanimous. *Division 1309* v. *San Diego Transit Corporation*, No. 78-1093-E (S.D. Ca.) (*"San Diego"*); *Division 1212* v. *Chattanooga Area Regional Transportation Authority*, No. CIV-1-79-212 (E.D. Tenn.) (*"Chattanooga"*); *Division*

(Footnote continued on next page)

There is no conflict with the decisions of this Court. Regarding jurisdiction, two lines of authority from this Court strongly support the outcome below. One, it is well and long established that analogous transit labor protective arrangements under the Interstate Commerce Act are enforceable in federal courts by the employees protected. 49 U.S.C. § 11347 (formerly, § 5(2)(f) of the Act), *Norfolk & Western Rwy. Co.* v. *Nemitz*, 404 U.S. 37 (1971). The myriad of unanimous decisions under § 13(c) simply sets forth that the labor protective arrangements between Union and employer under § 13(c), explicitly patterned on § 5(2)(f), are similarly enforceable. Regarding the second line of authority, this Court also ruled long ago that, where a federal statute commands employees and employers in transit to make arbitration agreements between

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(Footnote continued from preceding page)

1177 v. *Tidewater Transportation District Commission, et al.*, No. 79-968-N (E.D. Va.) (*"Norfolk"*); *Local 192* v. *Alameda-Contra Costa Transit District*, No. 513665-4 (Sup. Court of Cal.) (*"A-C Transit"*); *Division 1287* v. *Kansas City Area Transportation Authority*, No. 77-0663-W-2 (W.D. Mo.) (*"Kansas City, II"*); *Division 276* v. *Stockton Metropolitan Transit District*, No. 146157 (Sup. Court of Cal.) (*"Stockton"*); *Division 1235* v. *Metropolitan Transit Authority, ATE Management & Service Co., Trans. Management of Tenn., Inc.*, No. 80-3452 (M.D. Tenn.) (*appeal pending*, No. 80-5397) (*"Nashville II"*); *Division 1571* v. *Golden Gate Bridge Highway and Transportation District*, No. C-79- 2278 (N.D. Cal.) (*"Golden Gate"*); *Division 587* v. *Municipality of Metropolitan Seattle*, No. C80-1227M (W.D. Wash.), *stay denied*, No. 80-3532 (9th Cir.) (appeal pending) (*"Seattle"*); *Division 589* v. *Massachusetts Bay Trans. Auth.*, 511 F. Supp. 312 (D. Mass.), rev'd on other grounds, —— F. 2d ——, Nos. 81-1180, 81-1198 and 81-1219, (1st Cir. 9/30/81) mod. on reh 10/23/81; *Divisions 174 and 1037* v. *Southeastern Regional Transportation Auth., et al.*, No. 80- 2427-S (D. Mass. 1981) (*"Fall River/New Bedford"*); *Division 732* v. *Metropolitan Atlanta Rapid Transit Authority*, No. 81-1242A (N.D. Ga.) (appeal pending, No. 81-7613, 11th Cir.) (*"MARTA"*); *Division 1039* v. *Capital Area Transportation Authority*, No. G-81-200 (W.D. Mich.).

them, enforcement of the agreements arises under federal law for jurisdictional purposes. *International Association of Machinists* v. *Central Airlines,* 372 U.S. 682 (1963) hereinafter, *"Machinists"*).

Plaintiff's statement of a claim to enforce the § 13(c) Agreements is equally well founded. Section 13(c) was proposed and passed to avoid the provision of federal funds for transit in situations where the federal policy of collective bargaining was vulnerable to hostile state law. The legislation originated when, while Congress was considering the overall transit funding law, a private transit company in Dade County, Florida, was bought by a local public body, which decertified the union under a doctrine of local state law. Accordingly, Congress committed itself to protect transit employees against such an eventuality through labor protective arrangements. Hearings on S. 6, Subcommittee on Housing of the Sen. Comm. on Banking and Currency, 88th Cong., 1st Sess. (1963), at 314, 325 (hereinafter "Sen. Hearings"), and Hearings on H.R. 3881 before the House Comm. on Banking and Currency, 88th Cong., 1st Sess. (1963), at 563 (hereinafter "House Hearings"); *Dade County* v. *Amalgamated,* 157 So. 2d 176 (Fla. 1963).

In enacting § 13(c), Congress anticipated that, where employees are represented by a Union, the arrangements would be locally negotiated protective agreements, patterned after the privately enforceable labor protective agreements under the § 5(2)(f) of the Interstate Commerce Act, *supra* (hereinafter, "Section 5(2)(f)"). Congress charged the Secretary of Labor with discretion to determine that arrangements are fair and equitable, and his administrative regulations also require the parties to negotiate such agreements.

Section 13(c) Agreements are thus unassailably contractual mechanisms. A contract is inherently privately

enforceable by the parties to the contract,[6] and this Court has ruled that the Courts should not remit an action enforcing a federally created contract right to state court. *Transamerica Mortgage Advisors, Inc.* v *Lewis*, 444 U.S. 11 (1979). Accordingly, this case does not present the issues surrounding implication of private enforcement of a bald statutory prohibition or third party enforcement of a commitment running only to the United States.

Finally, Congress enacted § 13(c) explicitly to induce grant recipients, whose employees were formerly covered by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, to commit themselves not to apply hostile or inconsistent state law to the employees. Accordingly, the employee protective arrangements are the antithesis of an area of traditional local concern.

ARGUMENT

I.

THE COURTS BELOW HAVE UNANIMOUSLY RULED THAT FEDERAL JURISDICTION EXISTS AND PLAINTIFF STATES A CLAIM.

As set forth above, the decision Petitioner seeks to have this Court review is the 19th such decision since 1977. In each of the decisions, the Courts have recognized that, in § 13(c) of the UMTA, Congress required — as the Labor Department Regulations reflect — that statutory fair and equitable arrangements are to be carried out in each case through the vehicle of negotiated agreements between the employer and the Union involved. Accordingly, the 18 Courts have held that the § 13(c) Agreement embodies the federal statutory mandate in each case, and an action to enforce them arises under federal law for juris-

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6. The § 13(c) Agreements themselves also provide explicitly that they are to be "enforced by the parties thereto."

dictional purposes. To have held otherwise would have produced the anomalous result that the federally mandated transit labor agreements were enforceable only in state court. In the words of three federal Courts that considered the matter:

> Congress intended that the rights of transit employees be protected by contracts, and that it intended that the contracts entered into by the parties and approved by the Secretary of Labor would be enforceable, and that it would be fatuous to hold otherwise. (*Kansas City I, supra,* 582 F. 2d, at 453; *accord, LaCrosse, supra,* 585 F. 2d, at 1349; also cited by the Court of Appeals for the Sixth Circuit in this case. (Pet. App., p. 8a).[7]

The Courts have similiarly held that the structure and history of the UMTA lead ineluctably to the implication of Plaintiff's claim to private enforcement.[8] The Courts' holdings that Congress intended the § 13(c) Agreement scheme to be privately enforced by the parties stems from three sources: One, Congress' creation of a private contractual mechanism fairly implies a right to Court relief to have the contract enforced by the parties thereto. As the Court of Appeals for the Seventh Circuit expressed it:

> By definition a contract is a promise enforceable by law. 1 A Corbin, *Contracts* § 3 (1963). We agree with Judge Doyle's statement: "Congress intended that the contracts embodying the 'fair and equitable arrangements' were to be enforceable contracts. It would be fatuous to suggest otherwise. *Because the contracts were to be enforceable, it follows that they were to*

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7. As set forth above, 11 District Courts, including a number of Circuits not governed by the appellate decisions set forth above, and the state courts of states where Plaintiff has enforced its federal rights pursuant to *Testa* v. *Katt,* 320 U.S. 386 (1946), are similiarly persuaded by the weight and reasoning of these decisions.

8. As the Court expressed itself here, such an analysis *reinforces* its holding that the Court has jurisdiction over the private action enforcing the § 13(c) Agreements. Of course, the first holding, standing alone, would suffice to support the result here.

be enforced at the instance of the parties to the contracts." 445 F. Supp. at 811.

LaCrosse, supra, 585 F. 2d, at 1349-50 (emphasis added).

Second, grant recipients under § 13(c) commit themselves to abide by the federal substantive law:

> We recognize that under the laws of some states employees of public agencies are not accorded collective bargaining rights nor do they enjoy the benefits of such bargaining including arbitration. We think, however, that when a state or a combination of states forms a public transit agency for the express purpose of obtaining federal money to enable it to take over the business of a private transit company, and where the agency in order to obtain the money enters into a § 13(c) agreement that calls for interest arbitration, the obligation to arbitrate is binding on the agency, regardless of general state law or policy. (*Kansas City I, supra,* 582 F. 2d, at 452-3).
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> • • •
>
> Because § 13(c) mandates a "fair and equitable arrangement" that meets the approval of the Secretary of Labor, the exact and concrete terms of an arrangement define the more general requirements of the statutory provision. The approval of the Secretary stamps the 13(c) agreement as something more than a mere private contract formulated under the aegis of a federal statute. Instead, the contract is infused with statutory prerequisites. Clearly, then, the terms written into a 13(c) agreement are grounded in federal law. (*LaCrosse, supra,* 585 F. 2d, at 1346).
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> While defendants would like to have this case interpreted as being between private parties and subject only to Kentucky law, the Seventh Circuit Court in *LaCrosse, supra,* used the following applicable language in rejecting such a contention:
>
> "Because Sec. 13(c) mandates a 'fair and equitable arrangement; [etc], citing *LaCrosse, supra,* at 1346 (*TARC I, supra,* slip op. at 5). (Resp. App., p. B6).

In *Portland, supra,* the Court held:

> While this case does not neatly fit within the *Cort* paradigm, we believe that implication of a federal remedy is appropriate — for reasons that, in the end, are entirely consistent with the logic of *Cort* v. *Ash.* Section 13(c), as we have seen, is an extensive and federally-oriented statutory scheme. It commands, as a condition of UMTA assistance, the making of labor protective arrangements whose content must meet minimal specified substantive requirements and have had the approval of the Secretary of Labor. (*Portland, supra,* 589 F. 2d, at 13).

In *Division 589, Amalgamated Transit Union* v. *Commonwealth of Massachusetts, et al., supra,* (Petitioner's Supplemental Appendix) (hereinafter "Supp. App."), a constitutional challenge to the Massachusetts state transit bargaining law, the Court of Appeals for the First Circuit held that the Supremacy Clause does not prevent the state from taking the federal funds and then passing a law that nullifies its federal commitments. Regardless of the merits of that decision, on petition for rehearing, the Court did reiterate the holding in *Portland,* ruling, *en banc,* that:

> . . . we have not overruled *Greater Portland. Greater Portland* holds that the federal courts have jurisdiction to enforce § 13(c) agreements. We stated that we would not follow language in that opinion insofar as it might be read to suggest that a § 13(c) assurance automatically prevails over conflicting state law. *Greater Portland* will still offer both jurisdiction and meaningful relief in other cases. (Op., 10/23/81, at pp. 4-5) (Resp. App., p. F5).

The First Circuit thus properly construed its ruling in *Division 589* on the merits, as a substantive Supremacy Clause dispute, following the assumption of federal jurisdiction and statement of a claim.

Here, only the last two matters are at issue. The District Court here dismissed for lack of jurisdiction, and the

Court of Appeals reversed. No issue of the constitutionality of Tennessee law has been raised, nor, given the jurisdictional ruling below, could it have been raised. On these subjects, at issue on this petition for *certiorari*, the Appeals Courts are all in agreement.

Third, the Courts to consider the question have found that, should it be necessary, § 13(c) satisfies every test for implication of a private claim under *Cort* v. *Ash*, 422 U.S. 66 (1975), however construed. *Portland, supra; Jackson, supra; TARC, supra; Nashville, supra; Chattanooga, supra; Norfolk, supra; Kansas City II, supra; Seattle, supra; Fall River/New Bedford, supra.*

To cite just one of those authorities, as set forth above, in *Portland*, just reaffirmed by the Circuit, the Court held:

> But while this case does not neatly fit within the *Cort* paradigm, we believe that implication of a federal remedy is appropriate — for reasons that, in the end, are entirely consistent with the logic of *Cort* v. *Ash*. (*Portland, supra*, 589 F. 2d, at 13).

II.

THERE IS NO DISPUTE OF SUBSTANCE HERE.

In 1964, when Congress passed the UMTA, transit was overwhelmingly privately owned and operated and covered by the National Labor Relations Act. 1964 U.S. Code Cong. and Admin. News, pp. 2569, 2950. Publicly owned transit generally existed in the context of state laws providing for collective bargaining in transit resulting from past public takeovers. Sen. Hearings, pp. 313, 314, 325, 326, 336-344, 361-364, 367. House Hearings, pp. 565, 566, 578-595. However, just prior to the consideration of UMTA, Dade County, Florida, took over the formerly private transit system and, immediately thereafter, refused to bargain with the Union and abrogated the collective bargaining agreement. Sen. Hearings, pp. 314, 325; House Hearings, p. 565, *Dade County, supra.*

Congress was very concerned with this development; indeed, the debate made clear, a solution was critical to support for the bill. 109 Cong. Rec. 5672, 5675. Congress intended that federal money could not go to a grant recipient, unless adequate arrangements were made so that the employees could not be stripped of their rights, as they were in Dade County. In the words of Sen. Wayne Morse, the sponsor of § 13(c):

> In my judgment we cannot justify, as a matter of public policy, the use of federal dollars by local community or governmental unit thereof to be spent for the development of a transit system, the expenditure of which results in worsening the present collective bargaining rights of free labor which operates that transit system. 109 Cong. Rec. 5671.

After passage of the Act, each time a grant was requested, each grant recipient committed itself, as the Act requires, to protect employee rights.

In cities all over the country, the grant recipients under UMTA have been complying with the § 13(c) Agreements they executed in compliance with federal law for years. Since the agreements essentially protect the collective bargaining relationship that, as here, predated the federal funding by decades, the published authority, prior to 1977, reveals little controversy at all over this issue.[9]

In 1977, in an unpublished ruling, the United States District Court for the Northern District of New York dismissed an action to enforce § 13(c) for want of federal jurisdiction. *Syracuse, supra,* Op. of Judge Port, No. 77-CV-45 (N.D.N.Y. 1977); the parties settled, and that decision was vacated as moot. *Local 580* v. *CENTRO,* 578 F.

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9. Nor, for example, does the record here reflect that Jackson was in the habit of abrogating its collective bargaining agreements in the middle of the term and would only be restrained from so doing by the creation of a "federal transit labor law" complete with a miniature National Labor Relations Board.

2d 29 (2nd Cir. 1978). Thereafter, the Courts of Appeals for the First, Seventh, and Eighth Circuits, followed by every other court in the country to consider the matter, rejected the *Syracuse* decision, both as to its authority and reasoning.

However, *Syracuse* raised the prospect that some court somewhere might find that the § 13(c) employee protective agreements are not enforceable in federal court. Accordingly, grant recipients, one after another, began to refuse to comply with the provisions of the § 13(c) agreements, contending that the agreements were solely a matter of state law, and federal Courts lacked jurisdiction to enforce them.[10] As the reported decisions reflect, this litigation was overwhelmingly directed to the forum issue. Once the federal courts decided that the employee protective arrangements were to be enforced as a matter of federal substantive law, most cases reflect no further controversy over the substance of the § 13(c) obligations. *See, e.g., Portland, supra* (after jurisdiction found, no further litigation on the merits); *LaCrosse, supra* (District Court found jurisdiction and preliminary injunction entered without a hearing, affirmed on appeal, no petition for *certiorari*, no further proceedings on the merits, case dismissed); *Kansas City I, supra* (District Court found § 13(c) Agreement to be so clear no parol evidence considered, case settled after appeal); *Kansas City II, supra* (District Court found federal law applied; no appeal or further litigation on the merits); *San Diego, supra*

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10. The reported decisions reflect that many Defendants had been complying with their obligations quite uneventfully before 1977. For instance, the litigation in *Kansas City* and *LaCrosse, supra*, involved those Defendants' refusals to arbitrate, as set forth in the § 13(c) Agreements. Yet, prior to 1977, Defendant in each case had engaged in such arbitration without any necessity for litigation. *Kansas City, supra*, 582 F. 2d, at p. 482; *LaCrosse, supra*, 445 F. Supp., at p. 803.

(District Court found jurisdiction to enforce § 13(c) Agreements; preliminary injunction entered; case settled and appeal vacated as moot); *Norfolk, supra* (District Court found jurisdiction and entered preliminary injunction; case settled and vacated as moot); *CARTA, supra* (jurisdiction found, although injunction denied, case settled and dismissed as moot); *Fall River/New Bedford, supra* (Court found jurisdiction and preliminary injunction entered, case settled and appeal dismissed). Only one transit authority has ever disputed any other provision of a 13(c) Agreement after losing once on the jurisdictional issue. ("MARTA", *supra*).

The substance of each opinion also reflects the focus on forum and choice of law rather than a substantial dispute over the substance of what the § 13(c) Agreements required. Thus, as Judge Doyle noted four years ago, the issue here is not what Defendants are obliged to do, but rather whether they may escape their commitments altogether by claiming they are unenforceable. As Judge Doyle noted,

> . . . *LaCrosse* . . . seems to contend that even if Congress implied that, in the circumstances alleged here, provision for interest arbitration must be embodied in the 13(c) Agreement, the damage to the purposes of the UMTA resulting from that requirement is so grievous that Congress must be held to have intended to refrain from providing the means to enforce the requirement. I doubt that the rules of statutory construction permit a court to impute to a legislative body such weakness of spirit. (*LaCrosse, supra*, 433 F. Supp., at p. 815).

Thus, once the lower Courts rejected the notion that the § 13(c) Agreements were unenforceable, in each case, little further litigation ensued. The Defendants know that they cannot escape their employee protective commitments, and they do not do so.

In sum, there is no problem of a flood of litigation over substantive obligations, as there was none under the analogous provisions of the Interstate Commerce Act.

III.

THIS DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISIONS.

A.

The Cort Analysis Should Not Apply At All.

Petitioner contends that this Court's decisions, following *Cort* v. *Ash, supra,* regarding implied private enforcement of federal statutes, supports its contention that the Courts below were wrong in enforcing the Agreements here.[11]

By contrast, as detailed above, the lower Courts have uniformly set forth the proper framework for understanding this action. That is, where a federal statute mandates, and is effectuated by, the making of an agreement between private parties, an action enforcing the agreement states a non-frivolous claim to federal jurisdiction.

A federal statutory agreement, like any other contract, is enforceable by the parties to it. Accordingly, Plaintiff states a claim, and *Cort* v. *Ash, supra,* does not properly apply. *LaCrosse,* 585 F. 2d, *supra,* at p. 1350; *Kansas City,* 582 F. 2d, *supra,* at p. 453; *Portland,* 589 F. 2d, *supra,* at p. 13; *Jackson, supra* (Pet. App., pp. 8a-9a).

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11. Petitioner contends essentially that the Court below erred, because the statute does not "expressly" set forth that the Agreements may be enforced and that Congress was not "precise" in specifying a remedy. (Pet. App., pp. 12-13). This contention cannot possibly be sustained, because it would mean that the Court could *never* imply private enforcement of federal law. If the statute is "express" or the legislative history "precise", as petitioner contends, the Act of implication would be completely unnecessary. *Cannon* v. *University of Chicago,* —— U.S. ——, 99 S. Ct. 1946, 1954, n. 13 (1979).

B.

The Court Of Appeals Decision Is In Accord With This Court's Ruling Regarding The Interstate Commerce Act.

As the primary analysis reflects, *Cort* v. *Ash, supra,* is completely inapposite to this case. This case does not involve a bald statutory command or a contract only between the grant recipient and the United States. (Compare cases at Pet., p. 15). Section 13(c), as so many of the Courts have noted, is derived directly from § 5(2)(f) of the Interstate Commerce Act, to which it explicitly makes reference.[12] Section 5(2)(f) provides that, as a condition of federal approval of certain railroad mergers, fair and equitable arrangements be made to protect employees interests. Since the 1940's, § 5(2)(f), like § 13(c), has been effectuated through the mechanism of privately negotiated contractual employee protective agreements between the employer and the Union representing the employees involved and approved by the federal agency.

These employee protective agreements, which are a condition of Interstate Commerce Commission approval, are privately enforceable in federal court by the parties to them. *Norfolk & Western, supra; Brotherhood of Locomotive Engineers* v. *Chicago & Northwestern,* 314 F. 2d 424 (8th Cir. 1963); *Burlington Northern, Inc.* v. *American Railway Supervisors Ass'n.,* 503 F. 2d 58 (7th Cir. 1974); *Employees Protective Association* v. *Norfolk & Western,* 511 F. 2d 1040 (4th Cir. 1975), *aff'd. on remand,* 571 F. 2d 185 (1977).[13] Congress was well aware of these antecedents

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12. The legislative history is replete with references to § 5(2)(f) and the private agreement scheme. House Hearings, at 310, Senate Hearings, at 327; Senate Report #82, 88th Cong., 1st Sess. (1963); 109 Cong. Rec. at 5677, 5683.

13. The primary contractual vehicle under § 5(2)(f) was the (popularly called) Washington Job Agreement, later elaborated by

(Footnote continued on next page)

in the transit industry when it considered § 13(c), and said repeatedly and explicitly that it intended to create an analogous scheme.[14]

Moreover, when Congress considered and passed § 13(c), this Court had just ruled in *International Association of Machinists* v. *Central Airlines*, 372 U.S. 682 (1963), that the agreements made under a similar statutory command to the employers and employees in the air transit industry were enforceable in federal court by the employees involved.[15]

Accordingly, the ruling in the instant case that the Plaintiff may enforce the § 13(c) Agreements is consistent with the holdings of this Court and the Fourth, Fifth, Seventh and Eighth Circuits that labor agreements between employers and employees in the transit industry under analogous statutes are privately enforceable in federal court. Since § 13(c) unassailably stemmed from these antecedents, these statutory transit labor protective agreements are *sui generis* and not subject to the statutory analysis Petitioner proffers.

(Footnote continued from preceding page)

other Agreements. Sen. Hearings, *supra*, at 327. Moreover, the Courts of Appeals have held that all agreements that are a condition of federal approval of railroad actions under the Interstate Commerce Act are privately federally enforceable. *Florida East Coast Railway Co.* v. *Jacksonville Terminal*, 328 F. 2d 720 (5th Cir. 1964), *St. Louis Southwestern Railway* v. *City of Tyler, Texas*, 375 F. 2d 938 (5th Cir. 1967).

14. Indeed, Congress knew that UMTA money would be going to rail transit operations, many of which were already the subject of § 5(2)(f) protections. Congress explicitly stated that it did not mean to subject those rail employees to a lesser degree of protection under § 13(c) than they would have had under the Interstate Commerce Act. 109 Cong. Rec. 5676.

15. That *Machinists* also mandated enforcement of the agreements under the Interstate Commerce Act on which § 13(c) was patterned was at once apparent. *Jacksonville Terminal, supra; St. Louis Southwestern, supra* (citing *Machinists*).

Moreover, the Appeals Court ruling here also accords completely with this Court's general rulings regarding the private enforcement of statutes. Under these rulings, private enforcement of a statute may be implied when Congress explicitly patterns an Act after other privately enforced statutes. *Cannon* v. *Univ. of Chicago, supra,* —— U.S. ——; 99 S. Ct. at 1956-61; *Lorillard* v. *Pons,* 434 U.S. 575, 580 (1978). Here, in enacting § 13(c), Congress' repeated references to the § 5(2)(f) scheme, with its federally enforced labor protective agreements overwhelmingly —indeed ineluctably—supports such a conclusion.[16]

Congress' commitment to a federal forum for the enforcement of labor protective agreements between two private parties under § 13(c) was not at issue in *Cannon, supra,* 99 S. Ct., at 1983 n. 17, when Justice Powell wondered, in *dicta,* whether twenty lower court decisions on implied private actions were "each" correct. (Pet., p. 14). However, properly placed in its context as a law explicitly considered by Congress in 1964 as part of the privately enforceable federal scheme of transit labor protections, analogous to § 5(2)(f) of the Interstate Commerce Act and § 204 of the Railway Labor Act, it is clear that enforcement of § 13(c) simply does not raise the issues confronted by *Cort* or its progeny.

C.

The Outcome Here Accords With This Court's Decision In Transamerica Mortgage Advisors, Inc. v. Lewis.

As set forth above, by choosing the § 5(2)(f) model, incorporating as it does, the enforceable Washington Job

16. In refusing to imply a private action from a different provision of the UMTA, Petitioner's own authority, *Dopico* v. *Goldschmidt,* No. 80 CIV. 4562 (S.D.N.Y. July 24, 1981) (Pet., p. 10, n. 4), explicitly distinguished the case of a law that "parallel[s] a prior legislative act which may have previously been the subject of court rulings upholding a private right to action and of which Congress was aware." (*Dopico,* Slip Op. at p. 20). Just such a situation pertains here.

Agreement, and setting forth explicitly that it expected the protective arrangements to be negotiated in traditional bargaining, Congress created a contract scheme that was inherently privately enforceable. In *TAMA, supra,* 100 S. Ct., at 246, this Court ruled, exactly as the Courts have here, that a federal contractual scheme, which is inherently privately enforceable, must be "litigated somewhere", and that federal Court is the proper place.

There, § 215 of the Investment Advisors Act provided that certain Investment Advisors Contracts "shall be void", without explicitly providing for any private enforcement action to void the contract.[17]

In *TAMA,* this Court concluded that:

> . . . A person with the power to void a contract ordinarily may resort to a court to have the contract rescinded. (*TAMA, supra,* 100 S. Ct., at 246).

As set forth above at p. 10, the Courts of Appeals here have held in identical terms:

> By definition a contract is a promise enforceable by law. 1 A. Corbin, Contracts § 3 (1963), (*LaCrosse, supra,* 585 F. 2d, at 1349-50).

In *TAMA,* this Court definitively rejected Petitioner's suggestion that federally created contract rights should be remitted to state court:

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17. Unlike the statutory scheme at issue in every private action case cited by Defendant, but like § 215 of the Investment Advisors Act, § 13(c) has also been found to be devoid of any public or private administrative enforcement mechanism. The Courts have repeatedly ruled that the Secretary of Labor has no enforcement responsibility after the grant issues; his sole role is in seeing that the employers' arrangements with its employees exist and determining that they effectuate the statute beforehand. The Courts have ruled, similarly, that the Secretary of Transportation has no responsibility beyond ascertaining from the Secretary of Labor that the grant recipient has made such commitments to its employees and specifying that such commitments to the employees have been made, once certified. *Jackson, supra,* (District Court and Court of Appeals), *Local Division 1039* v. *CATA, supra,* Resp. App., at p. D14.

> One possibility, of course, is that Congress intended that claims under § 215 would be raised only in state court. But we decline to adopt such an anomalous construction without some indication that Congress in fact wished to remit the litigation of a federal right to the state courts. (*TAMA, supra,* 100 S. Ct., at 247, n. 8).

The § 13(c) Courts have held:

> If it were necessary, which it is not, that this question of federal law be decided only by state courts or only by federal courts, the federal courts would be more appropriate. In the circumstances described in the present complaint, I conclude that Congress implied that the judicial forum in which Local 519 may seek its remedy may be a federal court. (*LaCrosse, supra,* 445 F. Supp., at p. 812; *aff'd., LaCrosse, supra,* 585 F. 2d, at pp. 1349-50).

Thus, the § 13(c) decisions are not the least incompatible with this Court's rulings. Properly understood, the decisions relate uniquely to the structure of the § 13(c) arrangement, just as *TAMA* related to the structure of the voidness arrangement. Properly understood in its substantive context, the Sixth Circuit decision regarding enforcement of labor protective arrangements in transit under § 13(c) follows the long established enforceable model of the Interstate Commerce Act. Accordingly, both as a matter of structure and content, the decision here accords with the rulings of this Court; it is entirely outside of and not pertinent to the general question of implied private federal actions, and further review of the Sixth Circuit ruling is not necessary.

IV.

PETITIONER'S OTHER CONTENTIONS ARE EQUALLY ILL-FOUNDED.

Petitioner candidly admits here that:

> . . . one condition of the federal grant under UMTA is that transit authorities enter into certain arrange-

> ments with employees of any private transit system replaced or acquired by the public system by using grant funds. (Pet., at pp. 10-11).

Petitioner here would conceal the essential question of why Congress would mandate contract commitments unenforceable by the parties to them by characterizing the issue as:

> . . . whether § 13(c) of UMTA impliedly grants employees of a municipality owned public transit system a private federal cause of action, enforceable in federal courts, for breach of contract because the transit authority has received federal funds. (Pet., at p. 8).

In other words, Congress mandated the federal contract to be made, but not federally enforced.

Petitioner then proposes a series of reasons why Congress mandated unenforceable arrangements. One, enforcement of the § 13(c) labor protective agreements would entail the "creation of a new federal transit labor law." (Pet., p. 10). Even assuming that such an *ad hominem* assertion were logically persuasive, in fact, nothing remotely like any creation of a new body of labor law would be required. Section 13(c) requires the protection of employee rights such as collective bargaining, comparable to what existed before the impact of federal funding. The language and legislative history of § 13(c) is quite clear, and the 13(c) Agreement here sets forth this requirement in plain language. The Employer in *Jackson* could not tear up the collective bargaining agreement with its employees before the receipt of federal funds; § 13(c) prohibits such an abrogation of collective bargaining here. It is not surprising, therefore, that, as set forth above, the litigation here reflects the absence of real disputes over the substance of § 13(c).

In any case, the assertion leads nowhere. Petitioner cannot seriously contend that Congress would intend its

"labor" laws or any other "federal" laws not to be enforced. There is no logical connection between the assertion and the outcome Petitioner seeks.[18]

Next, Petitioner asserts that the § 13(c) Agreements should not be enforced, because the Court would be "transferring" this litigation to federal courts. To the contrary, Congress made it very clear in passing the UMTA that the Secretary of Labor must require grant recipients to make arrangements for the protection of existing "*federal* labor policy" in favor of collective bargaining, regardless of the existence of hostile or inconsistent state law. In the words of Sen. Morse, sponsor of § 13(c) as enacted:

> It is impossible to satisfy all Senators. The reason why it is impossible to satisfy them all is that we cannot satisfy each instance and protect the Federal policy, because some changes are going to have to be brought about in some of the States to conform to the Federal policy.
>
> I do not think there would be any great wrong done if we simply said to a State, "You do not qualify for this Federal grant." It does not mean they are entitled, as a matter of right, to the Federal grants irrespective of the fact that they are not following a policy that is in conformity with a Federal policy which I think sound public policy. (109 Cong. Rec. 5675).

Thus, Congress was actually seeking to avoid "creating" a "state" transit labor law. As set forth above, pp. 13-14,

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18. Petitioner's only alleged authority for this contention, *Dopico* v. *Goldschmidt, supra,* does not hold that the handicapped requirements of UMTA are not to be enforced at all, because they are "merely one part of a massive funding statute." (Pet., p. 10, n. 17). *Dopico* holds that, absent indicia of Congressional intent, such as language referring to another, privately enforceable statute, administrative enforcement of the commitments to the United States is the appropriate remedy. Here, however, the commitments run to Plaintiff; accordingly, entirely different considerations pertain. See, *supra,* p. 21, n. 17.

supra, the proposal to create § 13(c) originated as a result of labor's experience just before passage of UMTA, when a public body in Dade County, Florida took over a formerly private system and decertified the Union under state law forbidding collective bargaining with public employees. The legislative history of § 13(c) is replete with reference to the Dade County experience and the legislators' commitment not to allow the "transfer" to hostile state law of the long standing federal policy of collective bargaining. Indeed, the legislators defeated six different attempts to limit the federal protections to those "not inconsistent with" potentially hostile state law. Sen. Rep., *supra*, p. 50 (dissenting views of Sen Tower); 109 Cong. Rec. 5420, 5422, 5582, 5670, 5678 (1963). Ultimately, as Sen Morse expressed it:

> In my judgment we cannot justify, as a matter of public policy, the use of federal dollars by a local community or governmental unit thereof to be spent for the development of a transit system, the expenditure of which results in worsening the present collective bargaining rights of free labor which operates that transit system." (109 Cong. Rec. 5671).

This case graphically illustrates why Petitioner is also wrong in proposing that this is but a state law question of a public employee labor contract. The core question here is what federal law requires: Does the UMTA, which requires Defendants explicitly to promise their employees continued collective bargaining, prevent them from tearing up a collective bargaining agreement in the middle of the term?[19]

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19. Defendants cannot conceal the logical flaw in this position by adverting to *National League of Cities* v. *Usery*, 426 U.S. 883 (1976), and the other cases regarding Congress' reach under the Commerce Clause. The Courts are unanimous in rejecting this extension of *NLC* to the spending power area. *National League of*

(Footnote continued on next page)

Nor has Petitioner even remotely shown how complying with its decades old federal commitment to collective bargaining, which began under the National Labor Relations Act, undertaken as a condition of federal funding, would amount to a Tenth Amendment level disruption or that the state interest in abrogating its collective bargaining agreements with its employees outweighs the federal interest in protecting collective bargaining in federally funded transit takeovers. Essentially, Petitioner would have this Court use *NLC* to "transfer" to state law the responsibility for historically federal transit labor relations, contrary to the explicit refusal to do so therein. *NLC, supra,* p. 2475, n. 18. *Cf. United Transportation Union* v. *Long Island Rail Co.,* 634 F. 2d 19 (1980) *cert. granted,* — U.S. —, 49 U.S. L.W. 3946.

Petitioner bewails the absence of federal statutes or regulations governing the "interpretation" of the arrangements. (Pet., p. 12). Petitioner cites no authority for the contention that the federal courts cannot enforce federal

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Cities, supra, at 852, n. 17; *LaCrosse, supra; Kansas City I, supra; State of New Hampshire* v. *Marshall,* 616 F. 2d 240, 245 (1st Cir. 1980), *appeal dismissed,* —— U.S. ——, 101 S. Ct. 53; *Texas Landowners Rights Ass'n.* v. *Harris,* 453 F. Supp. 1025, 1029-30 (D.C.C. 1978), *aff'd. mem.,* 598 F. 2d 311 (D.C. Cir.), *cert. denied,* 444 U.S. 927 (1979); *Florida Dep't of Health & Rehabilitative Servs.* v. *Califano,* 449 F. Supp. 274, 284-84 (N.D. Fla.), *aff'd. mem.,* 585 F. 2d 150 (5th Cir. 1978), *cert. denied,* 441 U.S. 931 (1979); *Walker Field, Colorado Airport* v. *Adams,* 606 F. 2d 290 (10th Cir. 1979); *North Carolina ex rel. Morrow* v. *Califano,* 445 F. Supp. 532, 536 & n. 10 (E.D. N.C. 1977) (three-judge court), *aff'd. mem.,* 435 U.S. 962 (1978); *State of Oklahoma* v. *Schweiker,* —— F. 2d ——, No. 80-1004, (D.C. Cir. 6/18/81); *County of Los Angeles* v. *Marshall,* 631 F. 2d 767, 769 (D.C. Cir. 1980); *County of Los Angeles* v. *Adams,* 574 F. 2d 607, 609 (D.C. Cir. 1978) (per curiam); *City of Macon* v. *Marshall,* 439 F. Supp. 1209 (M.D. Ga. 1978); *Dupler* v. *City of Portland,* 421 F. Supp. 1314, 1320 & n. 8 (D. Me. 1976).

obligations unless *other* statutes or regulations address "construction" questions. The federal courts have proved to be perfectly capable of enforcing both federal statutes and contracts by their terms, including enforcing the agreements under the Interstate Commerce Act on which § 13(c) was based. Every time Congress passes a law, including laws effectuated by federally approved Agreements, the federal courts must decide disputes about its interpretation and construction without other statutes to guide them. Petitioner's construct is utterly novel and, not surprisingly, unsupported.

Next, without citation to any authority, Petitioner proposes that "the requirements of § 13(c) were fully satisfied "where the 13(c) Agreement was "executed" (Pet., p. 11), suggesting that the Agreement be unenforceable unless "harm has befallen any Jackson employee due to the 1966 grant." (Pet., p. 11). Neither the statute, nor the agreements certified by the Secretary, nor any other source, provides the least support for this suggestion. Petitioner understandably does not pursue the implication of its suggestion that Congress requires the execution of detailed labor protective agreements but intended them to be enforceable only upon fulfillment of a very restrictive condition precedent mentioned nowhere in the law or agreements.

Even assuming harm must be read into the statute, where, as here, the federal funds were the occasion for the transfer of the employees, into the public sphere, beyond the protections of the National Labor Relations Act, of course, the harm is obvious. Beyond cavil, the total abrogation of a collective bargaining agreement in the middle of the term would not be permitted under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* It is precisely this "harm" to transit employees that the Congress sought to avert.

Finally, Defendants also would greatly mislead this Court into believing that this litigation would generate some sort of flood in the federal courts over the enforcement of the garden variety collective bargaining agreements in transit. As set forth above, the parties lived under their federal scheme with little incident until the bench rulings in *Syracuse* in 1977. Understandably, thereafter, Defendants, faced with the prospect of escaping their federal commitments, resisted, until ordered to comply. However, once the forum was settled, almost no secondary substantive litigation resulted either under the § 13(c) Agreements, or, even less frequently, arising out of the collective bargaining agreements.[20] During that time, of course, hundreds of grievances have been processed to arbitration without incident in the bargaining units covered by § 13(c) Agreements under the traditional, long-standing commitment to collective bargaining and binding arbitration in transit which Congress sought to protect.[21]

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20. As anyone remotely acquainted with labor relations knows, collective bargaining agreements usually provide for resolution of disputes over the meaning of the collective bargaining agreement by binding arbitration and generate little litigation. Elkouri & Elkouri, *How Arbitration Works* (Ed. 1973), pp. 7, 12, n. 44. Petitioner misleadingly characterizes a string of cases as "invoiving collective bargaining agreements." The facts are that the cases involve enforcement of the federal employee protective agreements under § 13(c). (Pet., p. 23, n. 20).

The twelve cases Petitioner wrongly cites for its proposition involve one time litigation by the Union to enforce the explicit provisions *of the 13(c) Agreements*. The only exception is one case which involved both the § 13(c) Agreement and an arbitration award issued under the collective bargaining agreement. *Local Division 732* v. *MARTA*, C81-774A (N.D. Ga.).

21. The absence of such litigation forces Petitioner to rely for its prediction on such utterly unrelated authorities as fare and service cases. (Pet., p. 24, n. 21).

V.

ALTERNATIVE GROUNDS FOR DENIAL OF CERTIORARI.

Even assuming that the Petitioner were correct that Congress did not provide for the parties to enforce federal transit employee agreements explicitly, the ruling here would still be correct under the Civil Rights Act, 42 U.S.C. § 1983, and *certiorari* should be denied. *Maine* v. *Thiboutot*, —— U.S. ——, 100 S.Ct. 2502 (1980).[22]

Here, as in *Maine*, the federal law requires that, as a condition of federal funds, states and localities must make plans that meet federal requirements for the benefit of private parties. Here, as in *Maine*, by refusing to abide by the federally required plan, Defendant, a public body, has deprived Defendant of its rights arising under the federal law. The UMTA contains no explicit alternative scheme for private enforcement at all; accordingly, Congress cannot be held to have waived the Civil Rights Act remedy for violations of UMTA. *Adickes* v. *Kress*, 398 U.S. 144 (1970).

Maine v. *Thiboutot* is a complete alternative grounds for federal jurisdiction and Plaintiff's claim here, and, accordingly, the Appeals Court reversal of the dismissal was not error, and *certiorari* should not be granted.

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22. As this Court just ruled, it would be appropriate to reach the question of the applicability of *Maine* v. *Thiboutot* to this setting: "This case began long before that decision. Moreover, if controlling, this argument would obviate the need to consider whether Congress intended to authorize private suits to enforce these particular federal statutes." *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n.*, —— U.S. ——, 101 S. Ct. 2615, 2629 (1981).

CONCLUSION

Wherefore, for the reasons set forth above, the uniform rulings of five Appeals Court panels are not error, and this case should not be the subject of this Court's discretionary writ.

Respectfully submitted,

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Appendix

No. 79-1511

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DIVISION 1235, AMALGAMATED TRANSIT UNION, AFL-CIO,
Plaintiff-Appellee,

v.

METROPOLITAN TRANSIT AUTHORITY, ATE MANAGEMENT AND SERVICE COMPANY AND TRANSPORTATION MANAGEMENT OF TENNESSEE, INC.,
Defendants-Appellants.

On APPEAL from the United States District Court for the Middle District of Tennessee

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Decided and Filed June 3, 1981.

Before: MERRITT, KENNEDY AND MARTIN, Circuit Judges.

MARTIN, Circuit Judge, delivered the opinion of the Court, in which KENNEDY, Circuit Judge, joined. MERRITT, Circuit Judge (p. 6) filed a separate dissenting opinion.

MARTIN, Circuit Judge. This case presents substantially the same questions as *Local Division 1285* v. *Jackson Transit Authority,* No. 78-1185, decided today by this court. The legal issue is whether Section 13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 1601 *et seq.,* creates a private federal right of action for employees of local transit authorities which have received federal funds under

the Act. We submitted this question to detailed analysis in *Jackson* and decided that municipal transit employees do in fact enjoy an implied right of action under Section 13(c). We reiterate that conclusion here.

From 1956 to 1973, a private bus company provided intra-city transportation in Nashville, Tennessee. In 1973, however, the City of Nashville applied for and obtained a federal grant which enabled it to purchase the private company's assets and take over the operation of the mass transit system. At about the same time, the Nashville Metropolitan Transit Authority (MTA) concluded an agreement with ATE Management and Service Co., Inc., whereby ATE agreed to perform certain management functions, including labor contract negotiations, on behalf of the MTA. ATE then formed a subsidiary corporation, Transportation Management of Tennessee, Inc., which became the employer of the transit workers.

As a condition of federal funding, Section 13(c) of the Act requires grant recipients to make "arrangements" for the protection of their employees' interests.[1] Accordingly,

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1. Section 13(c) reads:

It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of em-

(Footnote continued on next page)

the MTA entered into a "Section 13(c) agreement" with Local 1235, Amalgamated Transit Union ("the Union"), the collective bargaining agent for the transit employees. For the purposes of this litigation, the crucial portion of the original 1973 Section 13(c) agreement is Paragraph 8; the corresponding section of a subsequent agreement, concluded in 1975 in connection with a second grant application, is Paragraph 9. Those paragraphs provide for the submission of labor disputes which remain unresolved after sixty days of collective bargaining to binding interest arbitration.[2]

(Footnote continued from preceding page)

ployees terminated or laid off; and (5) paid training or re-training programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

2. Paragraph 8 of the 1973 agreement provides, in pertinent part:

> In case of any labor dispute or controversy regarding the application, interpretation, or enforcement of any of the provisions of this agreement which cannot be settled by collective bargaining within sixty (60) days after the dispute or controversy first arises hereto, such dispute or controversy may be submitted at the written request of the Metropolitan Government (or the operator of the transit system as its designate) or the Union to a board of arbitration as hereinafter provided . . . The term "labor dispute," for the purposes of this paragraph, shall be broadly construed and shall include, but not be limited to, any controversy concerning wages, salaries, hours, working conditions, or benefits, including health and welfare, sick

(Footnote continued on next page)

The present dispute arose in May, 1979, upon the expiration of the collective bargaining agreement then in effect. In the course of negotiating a new collective bargaining agreement, the parties reached an impasse on the issue of wages. The employer refused a union request to proceed to arbitration, and the Union filed this suit.

The District Court, relying on 28 U.S.C. § 1331, assumed jurisdiction over the controversy. After hearing oral argument, it found that Section 13(c) of the Act gives the Union a right to enforce the arbitration provisions of the Section 13(c) agreement in federal court. On August 31, 1979, the District Judge issued an order directing the employer to submit to interest arbitration pursuant to the Section 13(c) agreement. The employer appeals.

As we have already observed, this case raises issues which we recently explored at length in *Jaskson, supra.* To the extent that the two cases are identical, we deem it unnecessary to recapitulate here the arguments which led to our inference of a private right of action from Section 13(c). Suffice it to say that the District Judge's resolution of the essential jurisdictional and substantive questions is entirely consistent with our approach in *Jackson,* and is hereby affirmed.[3] The present case does, however,

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(Footnote continued from preceding page)

> leave, insurance, or pension or retirement provisions, any differences or questions that may arise between the parties, including the making or maintaining of collective bargaining agreements, the terms to be included in such agreements, any grievances that may arise, and any controversy arising out of or by virtue of any of the provisions of this agreement for the protection of employees affected by the Project.

3. However, we express no opinion on the District Court's discussion of the employees' "right to strike." As the District Judge himself noted, that question is not essential to the resolution of this case.

differ from *Jackson* in two significant respects, which we address briefly.

First, in *Jackson*, the Union alleged a violation of a right guaranteed by Section 13(c) on its face — the right to continued collective bargaining. Here, however, the Union alleges a violation of its right to interest arbitration. Interest arbitration, although provided for in the parties' Section 13(c) agreements, is not specifically mandated by the statute itself. Thus, the present case squarely poses the question of whether the Union can seek relief in a suit predicated on the federal statute, or whether its complaint alleges no more than a state law breach of contract claim.

Three other circuits have held analogous claims to be actionable in suits under the statute even though Section 13(c) does not require protection of interest arbitration rights. *Local Division 714, Amalgamated Transit Union* v. *Greater Portland Transit Dist.*, 589 F. 2d 1 (1st Cir. 1978); *Amalgamated Transit Union* v. *LaCrosse Municipal Transit Util.*, 585 F. 2d 1340 (7th Cir. 1978); *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Trans.*, 582 F. 2d 444 (8th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979). We agree, as did the District Court, with that portion of the First District's *Greater Portland* opinion which holds that noncompliance with the provisions of a Section 13(c) agreement is tantamount to a violation of Section 13(c) itself:

> Section 13(c)'s implied requirement of compliance is not limited, moreover, to just those arrangements that may be said to be commanded by the substantive provisions articulated in § 13(c). Thus here the absence of an express requirement for interest arbitration is not significant. The statutory emphasis is upon the securing of fair and equitable arrangements to protect the interest of employees, as determined by the Secretary of Labor, which arrangements shall include "with-

> out being limited to," certain specified provisions. Once the labor protective arrangements have been made, approved, and incorporated in the grant contract they have become the vehicles for carrying out Congress' purpose. We believe that Congress contemplated that a grant recipient would comply with all the terms and conditions of an approved protective arrangement upon which the grant was conditioned, regardless of whether or not other terms and arrangements would have been equally acceptable under § [illegible](c). 589 F. 2d at 12.

Any other conclusion would, we believe, frustrate Congress' purpose in conditioning the receipt of federal funds upon effective protection of employee interests. *See Jackson, supra.*

Second, unlike *Jackson,* this case required the District Court to interpret certain provisions of the Section 13(c) agreement, including the scope and effect of the interest arbitration sections. On appeal, the employer insists that the interest arbitration provisions come into play only under limited circumstances; it asks us to reverse the District Judge's more expansive reading. After reviewing the record, however, we cannot find that the District Judge's interpretation is inconsistent with either the language of the agreement itself or ordinary canons of contract construction.

The judgment of the District Court is affirmed.

MERRITT, Circuit Judge, dissenting. I disagree that § 13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 1609(c) (1976), creates a private federal right of action for breach of contract by transit employees against municipal transit authorities receiving federal funds. I have set out the reasons for my disagreement in No. 78-1185, *Local Division 1285, Amalgamated Transit Union, AFL/CIO/CLC* v. *Jackson Transit Authority and the City of Jackson, et al.,* a companion case.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

DIVISION 1447, AMALGAMATED TRANSIT UNION, AFL/CIO,
Plaintiff,

v.

LOUISVILLE AND JEFFERSON COUNTY TRANSIT AUTHORITY, d/b/a TRANSIT AUTHORITY OF RIVER CITY and ATE MANAGEMENT AND SERVICE COMPANY,
Defendants.

CIVIL ACTION
No. C79-0629 L(A)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION

This action is submitted to the Court on the motion of the plaintiff for a preliminary injunction, the Court having previously overruled the motion of defendants to dismiss this action. Jurisdiction of this action is vested in the Court by virtue of 28 U.S.C. Sec. 1331 and 49 U.S.C. Sec. 1601 et seq., as amended, which is known as the Urban Mass Transportation Act, hereinafter referred to as UMTA. See *Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility,* 445 F. Supp. 798 (W.D. Wisc. 1977), aff'd. 585 F. 2d 1340 (7th Cir. 1978); *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority,* 582 F. 2d 444 (8th Cir. 1978), cert. denied —— U.S. —— (1979), 99 S. Ct. 872; *Division 714, Amalgamated Transit Union* v. *Greater Portland Transit District,* 589 F. 2d 6 (1st Cir. 1979).

It should be observed that nine other federal court decisions have already been rendered in this litigious field, and that there exists a split of authority on the question of jurisdiction, but this Court is convinced that the decisions cited above represent the sounder approach to a somewhat worrisome problem. It should also be observed that three district courts in the Sixth Circuit have already considered this question and that Judge Frank Wilson, in the case of *Division 1212, Amalgamated Transit Union* v. *Chattanooga Area Regional Transportation Authority*, No. CIV-1-79-212 (E.D. Tenn.) and Judge Thomas Wiseman, Jr., in the case of *Division 1235, Amalgamated Transit Union* v. *Metropolitan Transit Authority, et al.*, No. 79-3275 (M.D. Tenn.) have reached the same conclusion as has this Court, whereas District Judge Harry Welford of the Western District of Tennessee has reached an opposite conclusion in the case of *Local Division 1285, Amalgamated Transit Union* v. *Jackson Transit Union* v. *Jackson Transit Authority*, 447 F. Supp. 88 (W.D. Tenn. 1977), which has been pending on appeal to the United States Court of Appeals for the Sixth Circuit since August, 1978.

Prior to 1974, transit service in Louisville and Jefferson County, Kentucky was provided by two private companies, the Louisville Transit Company and Blue Motor Coach Company. In 1974, the defendant Transit Authority of River City, known as TARC, was created under Kentucky law and applied for a federal grant under UMTA in order to purchase the two private companies and provide transit service.

In 1974 TARC entered into a Collective Bargaining Agreement with the plaintiff union, Paragraph 11 of which provided as follows:

> "In the event of any labor dispute involving the Public Body and the employees covered by this agreement which cannot be settled within thirty (30) days after

> such dispute first arises, such dispute may be submitted at the written request of either the Union or the Public Body to a board of arbitration selected in accordance with the existing collective bargaining agreement if any, or if none, as hereinafter provided . . . The term 'labor dispute' shall be broadly construed and shall include, but not be limited to, any controversy concerning wages, salaries, hours, working conditions or benefits, including health and welfare, sick leave, insurance or pension and retirement provisions, the making or maintaining of collective bargaining agreements, any grievances that may arise, and any controversy arising out of or by virtue of any provisions of this agreement. Nothing in this paragraph, or agreement, shall be construed to enlarge or limit the right of the employees covered by this agreement, or their employer, to utilize upon expiration of any collective bargaining agreement or otherwise any economic measures that are not inconsistent or in conflict with the collective bargaining agreement or applicable law."

Prior to 1974, there had been no agreement between the union and the two private transit companies which provided for what is known as "interest arbitration". It is apparent from reading Paragraph 11 of the Collective Bargaining Agreement of 1974 that the parties contemplated that interest arbitration would be an integral part of their contract. At oral argument counsel for defendants contended that the last sentence of Paragraph 11, in effect, nullified the preceding sentences, in that it made the right of the parties to interest arbitration dependent upon state law and that Kentucky law prevented the defendants from entering into an interest arbitration agreement. That argument is without merit as may be seen upon a close reading of the last sentence.

Finally, in 1976 TARC agreed to what is known as the "National 13(c) Agreement" which applies to operating assistance only, but which includes Paragraph 11 in the Addendum to the National Agreement. The last collective

bargaining agreement between the parties expired on August 31, 1979, the 1974 Agreement having been superseded by an Agreement entered into on September 25, 1977. Prior to August 30, 1979 and since that time, the parties have been negotiating concerning the making of a new collective bargaining agreement. As early as August 30, 1979 and again on September 12, 1979, the union demanded binding arbitration which would end in the making of a new collective bargaining agreement. These offers were refused, and defendants now contend that the demands made by the plaintiff-union have been so outrageous that the union is guilty of bad faith bargaining and, therefore, cannot come into this Court and demand equitable relief under the "clean hands" doctrine.

To resolve this question resort must be had to the express language of the contract between the parties. The Collective Bargaining Agreement refers to any labor dispute involving the parties which cannot be settled within 30 days after the dispute arises. The Agreement does nothing more than require a labor dispute and its existence for 30 days or more. It does not require bargaining in good faith but merely the existence of a labor dispute. The Court has examined other contracts between other transit unions and transit authorities and has found that some of them do require bargaining in good faith before arbitration can be required. Failure of defendants to insist upon such a provision in their Agreement is fatal to their defense of bad faith bargaining. They, like the plaintiff, are locked into the specific terms of their Agreement.

Defendants contend that the plaintiff has not stated a cause of action under UMTA and under Section 13(c) of that Act. Title 42 U.S.C. Sec. 1609(c), Sec. 13(c) of the Act provides as follows:

> "(c) It shall be a condition of any assistance under Section 1602 of this title that fair and equitable arrange-

ments are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights and (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to Section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements."

Defendants contend that it was the intent of UMTA, and particularly Section 13(c), to protect employees against a worsening of their rights, and that since the employees had no interest arbitration in their Collective Bargaining Agreements with the private transit companies, that they are not entitled to use this provision of the Collective Bargaining Agreement to bring into play the jurisdiction of federal courts and their injunctive powers to enforce such an Agreement. The answer to that contention was ably discussed by District Judge Wiseman in the case of *Division 1235, Amalgamated Transit Union* v. *Metropolitan Transit Authority, et al, supra.* This Court adopts the reasoning of Judge Wiseman by reference.

The defendants also contend that plaintiff is not entitled to a preliminary injunction because plaintiff is seeking monetary relief. While that argument has considerable

theoretical appeal, it does not persuade the Court, especially in view of the fact that the parties have had an opportunity to fully develop by depositions and discovery the factual background of this dispute. Furthermore, in *Division 519 Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility, supra,* the Seventh Circuit upheld Judge Doyle in his granting of a preliminary injunction to the union requiring interest arbitration.

As stated by District Judge Wiseman, defendants have violated their Section 13(c) Agreements, and in so doing, they have implicitedly violated Section 13(c) itself. As Judge Wiseman also stated, that decision is contrary to the decision in *Division 580, Amalgamated Transit Union, AFL-CIO* v. *Central New York Regional Transportation Authority,* 556 F. 2d 659 (2nd Cir. 1977). Examination of these two decisions and of the other decisions, both pro and con, convince this Court that the reasoning of Judge Wiseman is more persuasive and should be followed.

While defendants would like to have this case interpreted as being between private parties and subject only to Kentucky law, the Seventh Circuit Court in *LaCrosse, supra,* used the following applicable language in rejecting such a contention:

> "Because Sec. 13(c) mandates a 'fair and equitable arrangement' that meets the approval of the Secretary of Labor, *the exact and concrete terms of an arrangement define the more general requirements of the statutory provision.* The approval of the Secretary stamps the 13(c) agreement as something more than a mere private contract formulated under the aegis of a federal statute. Instead, the contract is infused with statutory prerequisites. Clearly, then, the terms written into a 13(c) agreement are grounded in federal law." 585 F. 2d, at 1346 (emphasis added).

The Court observes that the members of the plaintiff-union are working for the same wages and under the same

conditions now as they were almost five months ago when the Collective Bargaining Agreement expired. It is apparent that there is a need for resolution of this labor dispute and that that need at the present apparenttly can only be met by interest arbitration. It is apparent also that the members of plaintiff-union are beneficiaries of the Collective Bargaining Agreement and will suffer irreparable injuries unless the 13(c) Agreement is enforced. See *Division 519 Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility, supra,* and *Division 1235, Amalgamated Transit Union* v. *Metropolitan Transit Authority, et al, supra.*

It is also apparent that plaintiff's chances of success on the merits are great and that the public interest will be served by the activation of the arbitration machinery, laborious though it may be. Of course, the parties still retain the right to settle their dispute at any time prior to the final resolution of their dispute by arbitration.

An order in conformity with this opinion has been entered this day.

Dated February 29, 1980.

CHARLES M. ALLEN,
Chief Judge.

cc: Counsel of Record

CERTIFIED
U.S. District Court,
Louisville, Ky.
Date: February 29, 1980
By: etao etaoin,
Deputy Clerk.

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No. 80-3203

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DIVISION 1447, AMALGAMATED TRANSIT UNION, AFL-CIO,

Plaintiff-Appellee,

v.

LOUISVILLE and JEFFERSON COUNTY TRANSIT AUTHORITY, d/b/a TRANSIT AUTHORITY OF RIVER CITY,

Defendant-Appellant.

ORDER

BEFORE: WEICK, KEITH AND JONES, Circuit Judges

Louisville and Jefferson County Transit Authority, d/b/a Transit Authority of River City (TARC) appeals from an order of the district court granting Division 1447, Amalgamated Transit Union, AFL-CIO's (the Union) motion for a preliminary injunction and ordering TARC and the Union to submit the disputed terms of a collective bargaining agreement to binding interest arbitration.

The Union is an unincorporated labor organization representing workers in the transit industry for the purpose of collective bargaining. TARC, through its management agent, operates the Louisville and Jefferson County transit system. TARC is the successor company to two private transit companies.

In 1974, TARC applied to the U. S. Government for a capital improvement grant under the UMTA of 1964, 49 U.S.C. § 1601, *et seq.*, to assist TARC in the acquisition of

privately-owned bus companies, the purchase of new transit coaches and the purchase of other equipment.

On February 26, 1974, TARC and the Union entered into an agreement as required by § 13(c) of the UMTA (the § 13(c) Agreement).

On February 5, 1976, the parties entered into the so-called "National § 13(c) Agreement" which applies to operating assistance only, but which includes paragraph 11 in the addendum to the agreement.

The last collective bargaining agreement between the parties expired on August 31, 1979. Prior to August 31, TARC and the Union tried to negotiate a new labor agreement. It appears that the parties continued to bargain until November 6, 1979, when an impasse was reached over issues of wages, pensions, cost-of-living allowances, and part-time employees.

On December 4, 1979, the Union brought this action against TARC for a declaratory judgment, injunctive relief, damages and attorney fees with respect to TARC's refusal to proceed to arbitration of the disputed terms of a collective bargaining agreement in violation of the Urban Mass Transporation Act (UMTA) and the parties' agreements thereunder.

On February 29, 1980, the district court granted the preliminary injunction and ordered the parties "to submit to a Board of Arbitration selected in accordance with their Collective Bargaining Agreement." The district court concluded that it had subject matter jurisdiction under 28 U.S.C. § 1331 and under the UMTA. Furthermore, the district court held that TARC's violation of the parties' section 13(c) Agreement implicitly violated section 13(c) itself. Finally, the district court decided that the Union is a beneficiary of the expired labor agreement and, as a consequence, will suffer irreparable injury unless the 13(c) Agreement is enforced.

On April 24, 1980, in recognition of an error it made, the district court issued an Order Clarifying Preliminary Injunction stating that the arbitration ordered "shall proceed according to the expressed terms of the 1974 Section 13(c) Agreement rather than as per the Collective Bargaining Agreement."

During the pendency of this case, this Court settled the conflict in this Circuit concerning the existence of subject matter jurisdiction and the propriety of interest arbitration. In *Local Div. 1285, Amalgamated Transit Union* v. *Jackson Transit Authority,* No. 78-1185 (6th Cir., filed June 3, 1981), in a similar action, we held, *inter alia,* that federal courts have subject matter jurisdiction to entertain cases arising under section 13(c) agreements and the UMTA. On the same day, we also decided that a Union's claim based upon an alleged violation of its right to interest arbitration stated a cause of action under federal law for which relief can be granted in federal court. *Division 1235, Amalgamated Transit Union* v. *Metropolitan Transit Authority, et al.,* No. 79-1511 (6th Cir.). Consequently, the district court's finding of subject matter jurisdiction and order compelling collective bargaining on binding interest arbitration were proper. We believe that the district court's order granting preliminary injunction is appropriate.

Accordingly, the judgment of the district court is AFFIRMED and the case is REMANDED for proceedings consistent herewith.

ENTERED BY ORDER OF THE COURT

JOHN P. ....., Clerk.

UNITED STATES OF AMERICA
IN THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LOCAL DIVISION 1039, AMALGAMATED TRANSIT UNION,
Plaintiff,

—vs—

CAPITAL AREA TRANSPORTATION AUTHORITY,
Defendant and Counter-Plaintiff,

—vs—

RAYMOND J. DONOVAN, Secretary, U.S. Department of Labor, and DREW LEWIS, Secretary, U.S. Department of Transportation,
Additional Defendants on Counter-Claim.

Case No. G81-200 CA
OPINION

This action was initiated by Local Division 1039 of the Amalgamated Transit Union to enforce an arbitration provision in a contract certified by the Secretary of Labor under Section 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609(c) (1976) ("UMTA"). Capital Area Transportation Authority ("CATA") is a municipal public corporation, which was formed in 1971 as a mass transportation authority under Michigan law. Since 1972, CATA has operated a bus system serving the City of Lansing and several surrounding communities.

Before 1972, the Lansing area bus system was operated by private firms. Employees of CATA are public employees whose employment is not regulated by Federal labor policies.

UMTA provides federal funds to state or local public authorities to acquire and operate transit systems. As a condition of any assistance under UMTA, Section 13(c) requires that "fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance." 49 U.S.C. § 1609(c).[1]

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1. 49 U.S.C. § 1609(c) states in its entirety as follows:

> (c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

On June 2, 1971, an agreement was entered into between the City of Lansing and Local Division 1039 pursuant to Section 13(c) of UMTA. Paragraph 7 of that agreement states that it "shall be binding upon the successors, and assigns of the parties hereto . . ." and that any publicly-owned body shall be bound by the terms of this agreement. Therefore, although CATA was not a signatory to this 13(c) agreement, it was clearly bound by its terms.

On May 8, 1975, CATA and Local Division 1039 entered into another 13(c) agreement providing for protective arrangements for employees affected by grants for which CATA had applied. Paragraph 9 of the 1975 13(c) agreement provides the following:

> "In the event of any labor dispute involving a Public Body and the employees covered by this agreement which cannot be settled within thirty (30) days after such dispute first arises, such dispute may be submitted at the written request of either the Union or the Public Body to a board of arbitration selected in accordance with the existing collective bargaining agreement, if any, or if none, as hereinafter provided . . . The term 'labor dispute' shall be broadly construed and shall include, but not be limited to, any controversy concerning wages, salaries, hours, working condition or benefits, including health and welfare, sickness, insurance, or pension and retirement provisions, the making or maintaining of collective bargaining agreements, the terms to be included in such agreements and the interpretation or application of such collective bargaining agreements, any grievances that may arise, and any controversy arising out of or by virtue of any provisons of this agreement. Nothing is this paragraph, or agreement, shall be construed to enlarge or limit the right of the employees covered by this agreement, or their employer, to utilize upon expiration of any collective bargaining agreement or otherwise any economic measures that are not inconsistent or in conflict with the collective bargaining agreement or applicable law."

This agreement supercedes the 1971 13(c) agreement between Local Union 1039 and CATA's predecessor.

Paragraph 14 of the 1975 13(c) agreements also provides that:

> "In the event any provision of this agreement is held to be invalid or otherwise unenforceable under the federal, State, or local law, such provision shall be re-negotiated for purpose of adequate replacement under section 13(c) of the Act. If such negotiation shall not result in mutually satisfactory agreement, either party may invoke the jurisdiction of the Secretary of Labor to determine substitute fair and equitable employee protective arrangements which shall be incorporated in this agreement in any other appropriate action, remedy, or relief."

In September, 1976, CATA subscribed to a model 13(c) agreement for the purpose of applications made by CATA for operating assistant grants under UMTA. Local Division 1039 had subscribed to this "national 13(c) agreement" in 1975. CATA and Local Division 1039 agreed to include paragraph 9 of their 1975 13(c) agreement in the national 13(c) agreement.

The Secretary of Labor certified that the 1971, 1975, and national 13(c) agreements, as agreed to by CATA and Local Division 1039, met the requirements of Section 13(c) of UMTA, 49 U.S.C. § 1609(c). As a consequence of these certifications, CATA has received and spent federal grant monies. Neither the Secretary of Labor nor his representatives told CATA or Local Division 1039 that a provision requiring binding arbitration of collective bargaining agreements was required for the 13(c) agreements to receive certification under UMTA. CATA has made no allegation that the Secretary of Labor was advised of any question concerning his authority to enter into these agreements or to carry out any of their terms or conditions.

On November 30, 1980, after reaching an impasse in negotiations with CATA and prior to the expiration of the 1977 collective bargaining agreement, Local Division 1039 made demands for interest arbitration under paragraph 9 of the 1975 13(c) agreement. The union contends that the arbitrator would not be restricted to any particular issues in forming a new labor agreement. CATA objects to this interpretation of paragraph 9, contending that unrestricted arbitration of all contract issues is not required and that Michigan law prohibits CATA from engaging in interest arbitration.

In March, 1981, CATA filed an unfair labor practice charge against the union with the Michigan Employment Relations Commission, alleging that by refusing to negotiate with CATA, the union committed an unfair labor practice. On April 13, 1981, the union filed its complaint and motion for preliminary injunction seeking to force CATA to participate in interest arbitration. CATA filed a counterclaim joining the Secretaries of Labor and Transportation as additional defendants, claiming that they exceeded their authority under UMTA.

I. JURISDICTION

The Court of Appeals for the Sixth Circuit has ruled that federal jurisdiction exists over claims arising under Section 13(c) agreements. *Local Division 1285* v. *Jackson Transit Authority*, No. 78-1185 (6th Cir. June 3, 1981). Because the 13(c) agreement is so inter-related to the federal statutory scheme of UMTA, the rights that are protected are not mere private contractual rights. As the Court in *Jackson* stated, "the section 13(c) agreement is a mandatory means of preserving rights created by a federal statute." As the present case concerns the 13(c) agreement that was negotiated between the union and CATA

pursuant to 49 U.S.C. § 1609(c), the court finds that it has jurisdiction under 28 U.S.C. § 1331 (1966) and 49 U.S.C. § 1609(c).

II. ENFORCEMENT OF THE 13(c) AGREEMENT

The union seeks to enforce paragraph 9 of the 1975 13(c) agreement which provides that any labor dispute that cannot be settled between CATA and the union within 30 days after it arises may be submitted to arbitration by either party. Paragraph 9 states that labor disputes "shall be broadly construed and shall include . . . the making or maintaining of collective bargaining agreements [and] the terms to be included in such agreements . . . " Negotiations between the parties reached an impasse and as a result no settlement has been reached on the formulation of the terms of a new collective bargaining agreement.

In *Division 1235* v. *Metropolitan Transit Authority,* No. 79-1511, Slip Op. at 3 (6th Cir., June 3, 1981), the parties agreed to virtually the same 13(c) agreement as that in the present case. The union and employer in *Metropolitan* reached an impasse on the issue of wages. The court affirmed the district court's order directing the employer to submit the labor dispute to interest arbitration pursuant to the 13(c) agreement. *Id.* at 5. Although interest arbitration was specifically provided for in the 13(c) agreement, it was not specifically mandated by the statute itself. Thus, the issue before the court was whether the union could seek relief in a suit predicated on section 13(c), or whether its complaint alleged no more than a state law breach of contract claim.

The court held that noncompliance with the provisions of a 13(c) agreement is a violation of section 13(c) of UMTA itself. As the court put it,

"We agree, as did the district court, with that portion of the First Circuit's *Greater Portland* opinion which holds that noncompliance with the provisions of a Section 13(c) agreement is tantamount to a violation of Section 13(c) itself:

Section 13(c)'s implied requirement of compliance is not limited, moreover, to just those arrangements that may be said to be commanded by the substantive provisions articulated in § 13(c). Thus here the absence of an express requirement for interest arbitration is not significant. The statutory emphasis is upon the securing of fair and equitable arrangements to protect the interests of employees, as determined by the Secretary of Labor, which arrangements shall include 'without being limited to' certain specified provisions. Once the labor protective arrangements have been made, approved, and incorporated in the grant contract they have become vehicles for carrying out Congress's purpose. We believe that Congress contemplated that a grant recipient comply with all the terms and conditions of an approved protective arrangement upon which the grant was conditioned, regardless of whether or not other terms and arrangements would have been equally acceptable under § 13(c)."

The court's holding, therefore, counters CATA's argument that state law governs. In *Division 1447* v. *Louisville and Jefferson County Transit Authority*, No. C79-0629, Slip Op. at 5 (W. D. Ky. Feb. 29, 1980), the court rejected a similar contention, stating:

" 'Because Sec. 13(c) mandates a "fair and equitable arrangement" that meets the approval of the Secretary of Labor, the exact and concrete terms of an arrangement define the more general requirements of the statutory provision. The approval of the secretary stamps the 13(c) agreement as something more than a mere private contract formulated under the aegis of a federal statute. Instead, the contract is infused with statutory prerequisites. Clearly, then, the

terms are written into a 13(c) agreement are grounded in federal law.' "

Quoted in Division 519 v. *LaCrosse Municipal Transit Utilities,* 585 F. 2d 1340, 1346 (7th Cir. 1978).

The court in *LaCrosse* made an analogy to another statute in holding that where a contract between parties is "infused with [federal] statutory prerequisites," it is federal law that governs. As the court stated,

> As for the needs of the "subject matter uniformity," those needs are identical for the fulfillment of the respective purposes of the two Acts. In *Central Airlines,* the Court expressed it thusly:
>
> > It is therefore the statute and the federal law which must determine whether the contractual arrangements made by the parties are sufficient to discharge the mandate of § 204 and are consistent with the Act and its purposes. It is federal law which would determine whether a §204 contract is valid and enforceable according to its terms. If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme. *Central Airlines, supra* at 690-91, 83 S.Ct. at 961-62.
>
> We need only substitute "§ 13(c)" for "§ 204" in the above quotation to illuminate the point.

The court in *Division 1287* v. *Kansas City Area Transportation Authority,* 582 F. 2d 444, 452-453 (8th Cir. 1978), added the following:

> [9] We recognize that under the laws of some states employees of public agencies are not accorded collective bargaining rights nor do they enjoy the benefits of such bargaining, including arbitration. We

> think, however, that when a state or a combination of states forms a public transit agency for the express purpose of obtaining federal money to enable it to take over the business of a private transit company, and where the agency in order to obtain the money enters into a § 13(c) agreement that calls for interest arbitration, the obligation to arbitrate is binding on the agency, regardless of general state law or policy.

The court also held that the district judge did not abuse his discretion in ordering binding interest arbitration to determine the terms of a new collective bargaining agreement after the parties had reached an impasse. The district judge's interpretation was consistent with the language of the agreement. *Metropolitan, supra,* at 5. Arbitration is not restricted, as CATA argues, to particular terms of a new collective bargaining agreement. The 1975 13(c) agreement clearly states that a "labor dispute" that can be sent to interest arbitration includes new terms of a collective bargaining agreement.

CATA argues that any obligation on its part to engage in binding interest arbitration would amount to an unlawful delegation of the powers and authority that have been conferred upon it as a public body. The court in *Kansas City, supra,* at 452, specifically rejected this argument in broadly construing the 13(c) agreement at issue there. I concur. CATA finally contends that this court should abstain from exercising its jurisdiction "to avoid unnecessary interference with the labor policies of" Michigan. A similar contention was raised by the transit authority in *Local Division 519* v. *LaCrosse Municipal Transit Utility,* 445 F. Supp. 798 (W.D. Wis.), *aff'd.,* 585 F. 2d 1340 (7th Cir. 1978). The court held that the question of the 13(c) agreement was one of federal, not state, law. Therefore, "a federal court, quite as much as a state court, is empowered to decide it." *Id.* at 811.

III. PRELIMINARY INJUNCTIVE RELIEF

The standards for granting or denying a preliminary injunction have been set forth in *Mason County Medical Association* v. *Knebel,* 563 F. 2d 256, 261 (6th Cir. 1977) as follows:

> "1) whether the plaintiffs have shown a strong or substantial likelihood or probability of success on the merits;
>
> 2) whether the plaintiffs have shown irreparable injury;
>
> 3) whether the issuance of the preliminary injunction would cause substantial harm to others;
>
> 4) whether the public interest would be served by issuing a preliminary injunction."

As the preceding discussion on the enforceability of a 12(c) agreement establishes, a strong probability exists that Local Division 1039 will succeed on the merits of the case. The recent Sixth Circuit case of *Metropolitan, supra,* holds that agreements made pursuant to section 13(c) of UMTA can be enforced by the federal courts. At least three other circuit courts are in accord with the view that the district courts can enforce interest arbitration pursuant to a 13(c) agreement. *Local Division 714* v. *Greater Portland Transit Authority,* 589 F. 2d 1 (1st Cir. 1978); *LaCrosse, supra; Kansas City, supra.*

Irreparable injury resulting from the failure of a transit authority to submit to interest arbitration has been found in other cases. In *LaCrosse, supra,* for example, the court stated the following:

> Turning to the second requirement, the finding of irreparable injury to the Union if LaCrosse did not proceed to compulsory arbitration cannot be considered an abuse of discretion. At the time of the lawsuit, the employees were working without a collective bargaining agreement and negotiations were at an impasse. Similiarly, we are convinced that the district

court did not abuse its discretion in ruling on the other prerequisites to the issuance of a preliminary injunction.

In *Division 1447* v. *Louisville and Jefferson County Transit Authority, supra,* the court determined that the union would suffer irreparable injury if the 13(c) agreement compelling arbitration were not enforced. As the court put it,

> "The court observed that the members of the plaintiff-union are working for the same wages and under the same conditions now as they were almost five months ago when the Collective Bargaining Agreement expired. It is apparent that there is a need for resolution of this labor dispute and that that need at the present apparently can only be met by interest arbitration. It is apparent also that the members of plaintiff-union are beneficiaries of the Collective Bargaining Agreement and will suffer irreparable injuries unless a 13(c) agreement is enforced."

The collective bargaining agreement in the present case expired approximately nine months ago, almost twice as long as the time in *Louisville.* Consequently, I find that the union has demonstrated irreparable injury.

I further find that the public interest will be served by issuing a preliminary injunction compelling arbitration. The enforcement of interest arbitration is unquestionably in the public interest. In *Kansas City, supra,* at 452, the court discussed the importance of enforcing a 13(c) agreement compelling arbitration:

> As is well known, the federal policy in favor of arbitration as a means of settling labor disputes is a very strong one. In addition to the cases last cited, see the familiar *"Steel Workers Trilogy"* of cases beginning with *United Steel Workers of America* v. *American Mfg. Co.,* 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960); *see also General Electric Co.* v. *Local 205, United Electrical, Radio & Machine Work-*

ers of America, 353 U.S. 547, 77 S. Ct. 921, 1 L. Ed. 2d 1028 (1957), and *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972 19757).

That policy would appear to be particularly applicable in the vital area of urban mass transit where strikes of workers are in the highest degree undesirable from the standpoint of the public.

As to whether the issuance of a preliminary injunction will cause substantial harm to others, CATA has not demonstrated that it would be harmed more than the union would be helped by arbitration of the pending labor dispute. *Division 587* v. *Municipality of Metropolitan Seattle,* No. C80-1227 (W. D. Wash. December 19, 1980).

Because the plaintiff-union has met the standard for preliminary injunctive relief, the court will grant its motion for preliminary injunction. The parties shall commence arbitration in accordance with the provisions of paragraph 9 of the 1975 13(c) agreement as more fully set forth in the order accompanying this opinion.

IV. MOTION TO DISMISS COUNTERCLAIM

The Secretaries of Labor and Transportation have moved to dismiss the counterclaim of defendant. The counterclaim alleges that the Secretary of Labor exceeded his authority in approving the 13(c) agreements between the parties and improperly delegated his powers to the union. Defendant also claims that the Secretary of Transportation exceeded his authority in making the 13(c) agreements part of various federal grants to CATA and improperly delegated his powers to the union. Because CATA alleges that the 13(c) agreements cannot withstand the prohibition on binding interest arbitration contained in Michigan law, it requests the Secretary of Labor to assist in renegotiating certain terms of the 13(c) agreement.

Defendant argues that the Secretary of Labor approved the interest arbitration clause in the 13(c) agreement in violation of a prohibition against interest arbitration in Michigan. Defendant refers to paragraph 14 of the 1975 13(c) agreement for its contention that the Secretary of Labor renegotiate the provision calling for interest arbitration. Paragraph 14 provides:

> "In the event *any provision of this agreement is held to be invalid* or otherwise unenforceable under the federal, State, or local law, such provision shall be re-negotiated for purpose of adequate replacement under section 13(c) of the Act. If such negotiation shall not result in mutually satisfactory agreement, either party may invoke the jurisdiction of the secretary of labor to determine substitute fair and equitable employee protective arrangements which shall be incorporated into this agreement and any other appropriate action, remedy, or relief." (Emphasis added.)

Although defendant cites a Michigan case in which the participation of a government instrumentality in binding arbitration was held invalid, it cites no case holding that any provision of the particular 13(c) agreement in question here is invalid. Furthermore, it has been held that state law cannot render invalid an interest arbitration provision in a 13(c) agreement. *Kansas City, supra,* at 453.

CATA's allegation that the Secretaries of Labor and Transportation exceeded their authority in certifying the 13(c) agreements in disbursing funds is similiarly without merit. 49 U.S.C. § 1609(c) only requires the Secretary of Labor to determine that minimum standards for the protection of transit employees are set forth in a 13(c) agreement. The particular terms of the agreement are left to negotiations between the parties. The union and CATA voluntarily agreed to adopt a binding interest

arbitration procedure in paragraph 9 of the 1975 13(c) agreement, which the Secretary of Labor certified. As the court in *Jackson* stated, "the secretary is [not] expected to supervise the conduct of the parties after an acceptable agreement is reached and the grant disbursed." *Jackson, supra,* at 15. The Secretary of Labor has not failed to carry out a duty required by UMTA. As for the Secretary of Transportation, his role is even more tenuous. He has no duties at all under section 13(c) of UMTA, and is, therefore, unable to provide the relief requested.

Because defendant has failed to state a claim upon which relief can be granted, the motion to dismiss the counterclaim will be granted.

DOUGLAS W. HILLMAN,
District Judge.

Dated: September 23, 1981.

UNITED STATES OF AMERICA
IN THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LOCAL DIVISION 1039, AMALGAMATED TRANSIT UNION,

Plaintiff,

—vs—

CAPITAL AREA TRANSPORTATION AUTHORITY,

Defendant and Counter-Plaintiff,

—vs—

RAYMOND J. DONOVAN, Secretary, U.S. Department of Labor, and DREW LEWIS, Secretary, U.S. Department of Transportation,

Additional Defendants on Counter Claim.

Case No. G81-200 CA

ORDER

This action having been submitted to the court on the motion of plaintiff for preliminary injunction and on the motion of additional defendants on the counterclaim, Raymond J. Donovan and Drew Lewis, and the court, having considered the briefs and oral arguments, and being fully advised in the premises, and on this date having entered its finding of fact, conclusions of law and memorandum opinion,

IT IS THEREFORE ORDERED that plaintiff and defendant, Capital Area Transportation Authority, submit their labor dispute to a board of arbitration selected in

accordance with paragraph 9 of the 1975 13(c) agreement between the parties, which board of arbitration shall have the power to determine a just and equitable collective bargaining agreement for the arbitrating parties. Paragraph 9 states the following:

> "The Public Body and the Union shall each, within ten (10) days, select one member of the arbitration board and the two members thus chosen shall select a third member who shall serve as chairman. Should the two members be unable to agree upon the appointment of the neutral member within ten (10) days, either party may request the American Arbitration Association to furnish a list of five persons from which the neutral member shall be selected. The parties shall, within five (5) days after the receipt of such list determine by lot the order or elimination, and thereafter each shall, in that order, alternately eliminate one name until only one name remains. The remaining person on the list shall be the neutral member. The decision by majority vote of the arbitration board shall be final, binding and conclusive and shall be rendered within forty-five (45) days from the date the neutral member is appointed. Awards made pursuant to said arbitration may include full back pay and allowances to employee-claimants. The salaries and expenses of the neutral member shall be borne equally by the parties to the proceedings, and all other expenses shall be paid by the party incurring them."

IT IS FURTHER ORDERED that submission to the board of arbitration for its decision as to what shall constitute the new collective bargaining agreement shall not constitute a bar to the right of the parties to continue to bargain with respect to the making of a new collective bargaining agreement.

IT IS FURTHER ORDERED that the parties shall initiate steps to set in process the arbitration procedures within ten (10) days after entry of this preliminary injunction.

IT IS FURTHER ORDERED that the motion to dismiss the counterclaim of defendant Capital Area Transportation Authority is granted.

IT IS FURTHER ORDERED that bond herein is set at Two Hundred ($200.00) Dollars.

DOUGLAS W. HILLMAN,
District Judge.

Dated: September 23, 1981.

F1

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1180

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, CLC,

Plaintiff, Appellant,

v.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Defendants, Appellees.

No. 81-1198

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, ET AL.,

Plaintiffs, Appellees,

v.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Defendants, Appellants.

No. 81-1219

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO,

Plaintiff, Appellee,

v.

THE COMMONWEALTH OF MASSACHUSETTS,

Defendant, Appellee.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Walter Jay Skinner, *U.S. District Judge*]

[511 F. Supp. 312 (D. Mass. 1981)]

Before

Coffin, *Chief Judge,*

Campbell, Bownes and Breyer,

Circuit Judges.

MEMORANDUM AND ORDER

Entered October 23, 1981

PER CURIAM. The plaintiff in these cases, the Transit Union, moves this court to reconsider its decision of September 30, 1981, to rehear this case *en banc,* and to grant an additional thirty days to file a further brief in support of its motions. The parties have had considerable opportunity to argue their position in this case. Initially, when this court considered an application for a stay of the district court's order, the Transit Union filed a brief, a reply brief, and argued orally at hearing. Subsequently, with the court's permission, the Transit Union filed a 100-page brief and a reply brief on the merits; it again participated in oral argument. It has now filed an 11-page brief in support of its present motions. All of these briefs have involved, roughly speaking, the same

issues which were considered thoroughly by this court in its September 30, 1981 opinion. We are therefore reluctant, given the demands of other cases, to grant extensions of time, and to invite further briefing.

Moreover, we do not believe that additional briefing is necessary given the arguments that the Transit Union now seeks to raise:

1. The Transit Union states that we did not address the question of whether the Massachusetts state laws violate the Contract Clause of the Constitution through conflict with the 1974 § 13(c) assurances that the Transit Union and the MBTA made to the Secretary of Labor; rather, our Contract Clause discussion focused upon the 1973 Basic Agreement between the Transit Union and the MBTA. It is true that the parties did not argue the "§ 13(c)/Contract Clause" issue as a separate matter before us. But, had they done so, the result would have been the same. We held that Congress intended that § 13(c) assurances be subject to specific state statutes to the contrary. Consequently, any § 13(c) agreement was made subject to possible state enactment of a conflicting statute. Hence, such a statute could not have impaired the obligations of the "contract" (if it was one).

2. The Transit Union argues that we ought not to have applied the standard of *Schwartz* v. *Texas*, 344 U.S. 199 (1952), requiring a clear showing of Congressional intent to preempt a field. Since we are dealing with the question of whether Congress intended a set of lengthy, detailed, specific assurances, presented to the Secretary of Labor by private parties to prevail over state law to the contrary, the *Schwartz* standard would seem appropriate. But even if it is not, the result would not change. Our review of the relevant legislative history, set out in the opinion, makes clear that Congress did not intend the

detailed, local assurances negotiated under § 13(c) to invalidate specific state laws to the contrary.

3. The Transit Union reiterates its view that our decision conflicts with the law in other circuits. We discussed the views of other circuits, including that of the Sixth Circuit and Eighth Circuit, in our opinion. We concluded that contrary views, for the most part, are expressed in dicta or alternative holdings. We found no other opinion that explored the issue in depth. None of the cases cited involves the type of conflict between state law and § 13(c) assurances present here, namely, state law that takes the form of a specific, clear state statute, directly and purposefully aimed at local transit problems (and an ambiguously worded § 13(c) agreement made several years before). We remain convinced that there is not yet any significant conflict on this issue among the circuits. But, in any event, for reasons previously set out, we have not followed the approach that the Transit Union believes the opinions that it cites suggest.

4. The Transit Union points to legislative history showing that § 13(c) was amended by Senator Morse and states that the amendment makes the difference. This court previously reviewed the entire legislative history of the statute, including the Morse amendment. That amendment was directed at the *terms* of the § 13(c) assurance, not at the question of whether the assurance was designed to supersede state law. Indeed, as the opinion points out, Senator Morse himself subsequently stated that the "state can continue its [conflicting] policy if it wishes to; but . . . the State should not be allowed to receive Federal money . . . ."

5. The Transit Union states that a rehearing *en banc* is required because we have modified a prior decision, *Local Division 714, Amalgamated Transit Union* v. *Greater Portland Transit District*, 589 F. 2d 1 (1st Cir. 1978). The

"question of when to hold, or when not to hold, an *en banc* hearing is within the discretion of this court." *United States* v. *Martorano,* 620 F. 2d 912 (1st Cir. 1980); Fed. R. App. P. 35(a). As we pointed out, we have not overruled *Greater Portland. Greater Portland* holds that the federal courts have jurisdiction to enforce § 13(c) agreements. We stated that we would not follow language in that opinion insofar as it might be read to suggest that a § 13(c) assurance automatically prevails over conflicting state law. *Greater Portland* will still offer both jurisdiction and meaningful relief in other cases.

6. The Transit Union makes other arguments related to the enforceability of § 13(c) and potential conflict between state law and that statute. We have discussed these issues in the opinion, describing the discretion that Congress meant to confer upon the Secretary of Labor and concluding that the Secretary maintains authority to prevent violation of the statute.

This cursory review of the issues the Transit Union now raises is meant to suggest that, for the most part, its arguments are dealt with more thoroughly in our previous opinion and that its other arguments do not provide adequate reason for a rehearing or a rehearing *en banc.* Consequently, the motions for a rehearing, rehearing *en banc,* and for an extension of time to file a further brief are denied.

By the Court:

/s/ DANA H. GALLUP,
Clerk.

Supplemental Brief 2

No. 81-411

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE,

Petitioners,

v.

LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND IN RESPONSE TO THE PETITIONERS' SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

	Page
I. ARGUMENT	2
A. Introduction	2
B. This Case Does Not Present The Supremacy Question At Issue In *Boston*	2
C. On The Common Issues, *Boston* Supports *Jackson*	5
D. Petitioner's Other Contentions Rest On Unsupported Dicta Of No Legal Significance	6
II. CONCLUSION	10

TABLE OF AUTHORITIES

Cases:	Page
Division 714, Amalgamated Transit Union v. *Greater Portland Transit District*, 589 F. 2d 1 (1st Cir. 1978)	5
Division 1039, Amalgamated Transit Union v. *Capital Area Transportation Authority*, No. G-81-200 (W. D. Mich. Sept. 23, 1981)	8
Keller v. *Adams-Campbell Co.*, 264 U.S. 314 (1924)	5
Layne & Bowler Corp. v. *Western Wells Works, Inc.*, 261 U.S. 387 (1923)	5
Local Division 589, Amalgamated Transit Union v. *Commonwealth of Massachusetts, et al.*, Nos. 81-1180, 1198 & 1219 (1st Cir. Sept. 30, 1981, *modified on rehearing en banc*, Oct. 23, 1981	passim
Other Authorities:	
Urban Mass Transportation Act 49 U.S.C. § 1609(c)	passim
29 Code of Federal Regulations § 215	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE,

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v.

LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND IN RESPONSE TO THE PETITIONERS' SUPPLEMENTAL BRIEF

Respondent, Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC, pursuant to Rule 22.6 of the Supreme Court Rules, hereby supplements its Brief in Opposition to the Petition for a Writ of Certiorari to respond to the issues presented by Petitioners'[1] Supplemental Brief, filed with this Court November 2, 1981.

---

1. Petitioners are Jackson Transit Authority and the City of Jackson, Tennessee (hereinafter "Jackson").

I.

ARGUMENT

A. Introduction

Petitioners' Supplemental Brief (hereinafter, "Pet. Supp. Br.") attempts to demonstrate that a recent decision of the United States Court of Appeals for the First Circuit, *Local Division 589, Amalgamated Transit Union* v. *Commonwealth of Massachusetts, et al.*, Nos. 81-1180, 1198 and 1219 (1st Cir. Sept. 30, 1981), *modified on rehearing en banc,* Oct. 23, 1981 (hereinafter, "*Boston*") and the decision of the United States Court of Appeals for the Sixth Circuit in the instant case are in conflict.[2] As set forth more fully below: (1) *Boston* decided a question of federal/state supremacy nowhere present in this case, and (2) on the issues presented here, *Boston* supports, rather than conflicts with, this case.

B. This Case Does Not Present The Supremacy Question At Issue In Boston.

In *Boston,* as set forth in Respondent's initial Brief in Opposition to the Petition for *Certiorari* (hereinafter, "Resp. Opp. Cert."), at 12, the United States Court of Appeals reversed the entry of a preliminary injunction against enforcement of a Massachusetts state law regarding the collective bargaining rights of employees, otherwise protected by § 13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 1609(c) (hereinafter "UMTA"). While affirming the District Court's assertion of federal

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2. Jackson does not discuss or reproduce the later opinion of the First Circuit, rehearing *en banc,* issued Ocobter 23, 1981. A copy of the *en banc* decision is included in Respondent's Appendix (hereinafter, "Resp. App."), p. F1-F5.

jurisdiction and Plaintiff's claim to enforce the UMTA in *Boston,* the Court of Appeals ruled, on substantive grounds, that Congress did not intend the federal mandate of §13(c) to govern in face of a directly conflicting state statute. By contrast, here, the District Court dismissed for lack of federal subject matter jurisdiction; the Sixth Circuit reversed the dismissal. Thus, the only issues presented in this case are (1) whether federal subject matter jurisdiction exists, and (2) whether Respondents have a claim for enforcement of their federal rights.[3]

To support their contentions of conflict, Petitioners assert that: ". . . the First Circuit determined not to follow [the *Jackson* decision]" (Pet. Supp. Br., p. 5). Petitioners' version of the *Boston* decision, with its bracketed interposition of "[the *Jackson* decision]" appears nowhere in *Boston.* The *Boston* Court expressly limited its concern with *Jackson* to the only issue it addressed: whether federal law is supreme. Noting that *Jackson* contained some *dicta* — not "decision" — on the subject, the *Boston* Court actually said:

> *We recognize that there are dicta in Jackson* and *Kansas City Area Transportation Authority* which appear to support the Transit Union's position. And, subsequent to the decision of the Eighth Circuit, a district court ruled, in an alternative holding, that

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3. Petitioners in *Jackson* never filed an answer in the District Court; accordingly, the record is devoid of meaningful indication of what the substantive defenses will be, less that they will be similar to *Boston,* least, what the Court would do if confronted with such contentions. The record here does not even reflect the existence of the federal/state conflict at issue in *Boston;* indeed, to the contrary, the District Court ruling in Jackson rested in part on its finding that Tennessee state law supports the Plaintiff claim. (Pet. App., pp. 8a, 29a).

> where state law and a § 13(c) agreement are in conflict, *state law must yield. Division 1287* v. *Kansas City Area Transportation Authority,* 485 F. Supp. 856, 863-864 (W.D. Mo. 1980). But see generally *Division 580, Amalgamated Transit Union* v. *Central New York Regional Transportation Authority,* 556 F. 2d 659, 662 (2d Cir. 1977) (suggestive of support for proposition that state law need not yield when in conflict with § 13(c) agreement). Several unpublished opinions also lend support to the Transit Union's position. None of these opinions, however, consider the issue in depth, and we have determined not to follow them. (Pet. Supp. Br. 5, Appendix (hereinafter, "Pet. Supp. App."), p. 35a) (emphasis added).

The *Boston* Court was not even sure that the *Jackson* dicta conflicted with its position on that subject.

> Because the opinions do not explore the precise nature of the conflict between state statutes and federal assurances, we are uncertain of the extent to which their language directly conflicts with our holding here. (Pet. Supp. App., p. 36a).

Immediately following this language, the First Circuit issued its holding on the only question it was actually considering: which law must yield. (Pet. Supp. App. p. 37a)

In its opinion on rehearing *en banc,* the First Circuit strengthened its disclaimer of conflict with *Jackson:*

> We concluded that contrary views, for the most part, are expressed in dicta or alternative holdings. We found no other opinion that explored the issue in depth. None of the cases cited involves the type of conflict between state law and § 13(c) assurances present here, namely, state law that takes the form of a specific, clear state statute, directly and purposefully aimed at local transit problems (and an ambiguously worded § 13(c) agreement made several

> years before). We remain convinced that there is not yet any significant conflict on the issue among the circuits. (Resp. App., p. F4).

In sum, there is no conflict here. Absent such a conflict, *Jackson* should not be further reviewed. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *Keller* v. *Adams-Campbell Co.*, 264 U.S. 314, 319, 320 (1924).

C. On The Common Issues, Boston Supports Jackson.

By leaving standing, in *Boston*, the jurisdictional holding in its three year old decision, *Division 714, Amalgamated Transit Union* v. *Greater Portland Transit Dist.*, 589 F. 2d 1 (1st Cir. 1978) (hereinafter, *"Portland"*), the *Boston* Court maintained its concurrence in the uniform holdings of the four other Appeals Court panels, including the *Jackson* panel, on the subjects at issue here: (1) that the Plaintiff's action to enforce the terms of a federally mandated labor protection agreement arises under federal law for purposes of federal subject matter jurisdiction, and (2) that Plaintiff states a claim for private enforcement of its federally mandated labor protections.

However, because the original *Boston* decision raised questions regarding portions of the same Court's three year old decision in *Portland* (relating to the role of state law not at issue here), Plaintiff in that case filed a Motion asking the Court to review, *en banc*, the impact of *Boston* on *Portland*.

In its *en banc* opinion in *Boston*, the Court of Appeals for the First District explicitly reaffirmed the validity of *Portland:*

> . . . we have not overruled *Greater Portland*. *Greater Portland* holds that the federal courts have jurisdic-

> tion to enforce § 13(c) Agreements. We state that we would not follow language in that opinion insofar as it might be read to suggest that a § 13(c) assurance automatically prevails over conflicting state law. *Greater Portland* will still offer both jurisdiction and meaningful relief in other cases. (Resp. App., p. F5).

In *Portland,* the First Circuit had ruled that, for purposes of determining federal enforcement of § 13(c), federally created transit labor protections were the creatures of the federal act. In thus finding an implied private right of action in *Portland,* the Court properly held that transit labor protections under § 13(c) were the "concern of the federal government, not basically the concern of the states." (*Portland supra,* at 16). However, the *Portland* Court acknowledged that public employee labor relations was an area of traditionally state concern. *Id.* The *Boston* Court did not retreat from either position. The *Boston* Court addressed the question, at issue neither in *Jackson,* nor in *Portland,* of what happens when the federal concern for transit labor protections come into conflict with the state concern over local public employee relations. While the *Boston* answer to this question, right or wrong, is of no moment here, the *Boston* reaffirmation of the aspects of *Portland* actually involved here should dispose of Petitioners' claim that the holding in *Boston* conflicts with the Sixth Circuit's decision in *Jackson.*

D. Petitioners' Other Contentions Rest On Unsupported Dicta Of No Legal Significance.

However, Petitioners also contend that *Boston* conflicts with *Jackson,* on the grounds that ". . . the First Circuit correctly *held,* 'the federal statutory scheme [enacted in UMTA] may provide other remedies for violation of an

assurance'." (Pet. Supp. Br., p. 6) (emphasis added). Later, Petitioners assert that *Boston* "found" administrative relief for violation of UMTA. (Pet. Supp. Br., p. 9). Petitioners conclude:

> That [Jackson] court found ambiguity in the first Circuit's decision in *Local Div. 714* v. *Greater Portland Transit District, etc.*, 589 F. 2d 1 (1st Cir. 1978), concerning the presence or absence of such an administrative remedy. However, such ambiguity was clearly resolved in *Local 589*, which found precisely such administrative relief to have been provided by UMTA. The decision in *Local 589* therefore, places the First and Sixth Circuits in diametric conflict. . . . (Pet. Supp. Br., p. 9).

Petitioners thus consistently misrepresent what the *Boston* Court did: the Court neither "held", nor "found" anything of legal significance with regard to administrative enforcement. The Court's statements regarding such enforcement are pure *dicta*, of no precedential significance at all.[4]

What the First Circuit did decide was that Congress intended Massachusetts to abide by its federal commitments only until such time as the Massachusetts state legislature acted to nullify them. (Pet. Supp. App., p. 37a) The Court's cursory speculation that "the threat of receiving no fur-

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4. Moreover, the *Boston* Court speculated entirely on the role of the *Secretary of Labor* (Pet. Supp. App., pp. 19a, 21a-23, 28a, 29a, 32a, n. 45; *See especially*, p. 33a, regarding the "ongoing power" of the *Secretary of Labor*). That aspect of *Portland* at issue in *Jackson* spoke solely of the *Secretary of Transportation*. (Pet. Supp. Br., p. 8). The *Boston* decision never mentions the Secretary of Transportation at all. Accordingly, the discussion in *Boston* resolves no "ambiguity" left in *Portland* and has no relevance to anything with which *Jackson* is concerned.

ther UMTA funds would often prevent a state currently receiving those funds from changing its laws contrary to the policy of § 13(c)," or that "if not, the Secretary might halt the flow of funds or take other appropriate action" (Pet. Supp. App., p. 32a), is neither essential to nor part of the holding.

Moreover, the *Boston* Court's speculation about what that Secretary of Labor "might" do is of little legal moment. (Pet. Supp. App., pp. 33a-34a).[5] The Secretaries were not Defendants in *Boston;* they had no opportunity to present the *Boston* Court with their position, presented here below, that they do not treat compliance with the § 13(c) Agreement as their enforcement responsibility at all. *See, infra,* n. 6, p. 8.

Not surprisingly, therefore, the First Circuit's speculation in *Boston* reflects the complete absence of any briefing or factual record on the subject. Indeed, the Court cites to no authority for its speculation.[6] The First Circuit's pure

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5. The Court's conditional form of the opinion alone belies any precedential significance to the Court's speculation here.

6. As reflected in the record in this case and in the opinion of the District Court for the Western District of Michigan, *Division 1039* v. *Capital Area Transportation Authority,* No. G-81-200 (W.D. Mich. Sept. 23, 1981) (Resp. App. p. D1-D14), § 13(c) provides only that the Secretary of Labor will determine that fair and equitable arrangements are made. The Secretary's own guidelines reflect the Secretary's commitment to insuring only that the parties have concluded a fair and equitable agreement and certifying to the Secretary of Transportation that the arrangements are in place. 29 C.F.R. § 215. As the instant case accurately reflects, thereafter, the Secretary of Labor has successfully contended that he has no further role to play, and the enforcement of the fair and equitable arrangements is completely up to the parties. *Jackson, supra* (Pet. App. pp. 14a-17a); Memorandum of Law in Support of the United States' Mo-

(Footnote continued on next page)

speculation, absent any live case or controversy involving the Secretaries, and absent any briefing or authorities on the subject, cannot possibly be elevated to the level of a holding constituting a conflict between the two Circuits, meriting *certiorari* here.

Moreover, the rulings in *Boston* and *Jackson* are completely compatible in this regard. Despite its speculation on the existence of an administrative remedy, the U.S. Court of Appeals for the First Circuit ruled in *Portland* and reaffirmed in *Boston* that, even assuming the possibility that administrative enforcement might be forthcoming, the parties in this case would still be able to enforce their labor protective agreements themselves. *Portland, supra,* p. 15; *Boston, supra,* (Resp. App., p. F5). The Sixth Circuit ruling in *Jackson* is a much narrower, but still compatible one: the Court held that, absent any administrative remedy, Plaintiff may enforce its own agreements privately. Thus,

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(Footnote continued from preceding page)

tion to dismiss or In the Alternative for Summary Judgment in *Jackson*. (Respondent has requested the certification to this Court of this Memorandum which was filed in the District Court.) As the instant case similarly reflects, the Secretary of Transportation is involved only because the grant contract with the Department of Transportation specifies that the recipient has made the requisite arrangements with their employees. (*Id.*). The Secretary of Transportation similarly contended he has no further role to play. (*Id.*).

The Petitioners take the opportunity presented by the *Boston* decision to criticize obliquely, and for the first time, the *Jackson* Court's willingness to imply private enforcement while failing to imply public enforcement. (Pet. Supp. Br., p. 8, n. 2). Since the Petitioners nowhere contend that the *Jackson* Court should have found any public official charged with enforcing the § 13(c) Agreements, one can only conclude, again, that Petitioners contend the federal mandate should not be enforced at all.

nothing in either of those cases creates a conflict requiring this Court to review the narrower decision.

Finally, in any case, even if the Petitioners were correct and the *Boston* Court had held that it could imply a discretionary public enforcement mechanism, the outcome in *Jackson* would be the same, because of Respondent's claim under 42 U.S.C. § 1983. *See,* Resp. Opp. Cert., p. 29.

II.

CONCLUSION

The *Boston* decision is explicitly and repeatedly limited to the issue of federal/state supremacy raised there, but not here. *Boston* reaffirmed the *Portland* holding on the questions of jurisdiction and private enforcement that are at issue here. The *Boston* Court's hypothetical *dicta* regarding the Secretary of Labor is of no legal significance. Thus, there is no conflict meriting *certiorari,* and the writ should be denied.

Respectfully submitted,

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Petitioner's Reply Brief

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No. 81-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACKSON TRANSIT AUTHORITY AND THE,
CITY OF JACKSON, TENNESSEE,
Petitioners,

v.

LOCAL DIVISION 1285, AMALGAMATED TRANSIT
UNION, AFL-CIO-CLC,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

PAGE

ARGUMENT:

The Brief in Opposition wrongly seeks to avoid consideration of the congressional intent in enacting UMTA Section 13(c), and does not set forth reasons sufficient to warrant denial of the Petition 1

TABLE OF CITATIONS

Cases

Brotherhood of Locomotive Engineers v. Chicago & Northwestern, 314 F.2d 424 (8th Cir. 1963) 5, 7, 8

Cort v. Ash, 422 U.S. 66 (1975) 2

Division 276 v. Stockton Metropolitan Transit District, No. 146157 (Sup. Ct. of Calif.) 4

International Ass'n of Machinists v. Central Airlines, 372 U.S. 682 (1963) 5, 8, 9

Ivy Broadcasting Co. v. American Tel. & Tel., 391 F.2d 486 (2d Cir. 1968) 3

Local 192 v. Alameda-Costa Transit District, No. 513665-4 (Sup. Ct. of Calif.) 4

Local Div. 589, etc. v. Massachusetts, 511 F. Supp. 312 (D. Mass.), *modified* Appeal No.'s 81-1180, 1198 & 1219 (1st Cir. Sept. 30, 1981) 4

Local 589, etc. v. MBTA, C.A. No. 45919 (Suffolk, Mass. Sup. Ct.) 4

Local Div. 732 v. MARTA, Civ. No. 67766 (Sup. Ct. Fulton Co., Ga. 1980) 4

Maine v. Thiboutot, U.S. , 100 S. Ct. 2502 (1980) 9

McFaddin Express, Inc. v. Adley Corp., 346 F.2d 424 (2d Cir. 1965) 3

PAGE

McGlaughlin v. Penn Central Co., 384 F. Supp. 179 (S.D.N.Y. 1974) 6

National R. R. Passenger Corp. v. Passenger Ass'n, 414 U.S. 453 (1974) 3

Nemitz v. Norfolk & Western Ry. Co., 287 F. Supp. 221 (N.D. Ohio 1968); 309 F. Supp. 575 (N.D. Ohio 1969), *modified* 436 F.2d 841 (6th Cir. 1971), *aff'd* U.S. 37 (1971) 5, 6, 7

Pan American Petro. Corp. v. Sup. Ct. of Del., 366 U.S. 656 (1961) 3

Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125 (1974) 3

Prescription Plan Serv. Corp. v. Franco, 522 F.2d 493 (2d Cir. 1977) 3

United Transp. Union v. L.I.R.R., 634 F.2d 19 (2nd Cir. 1980), *cert. granted* U.S. , 69 L. Ed. 2d 970 (1981) 4

Wheeldin v. Wheeler, 373 U.S. 647 (1963) 3

Statutes

28 U.S.C. § 1336 ..... 6, 8

42 U.S.C. § 1983 9

45 U.S.C. § 184 8

49 U.S.C. § 5 ..... 6, 7

49 U.S.C. § 9 6

49 U.S.C. § 16 ..... 6, 8

49 U.S.C. § 156 7

49 U.S.C. § 1609 ..... *passim*

PAGE

Other

Moore's Federal Practice, ¶ 0.62 [2.-2] 5

13 C Wright, Federal Practice and Procedure,

§ 3522 4

§ 3562 3

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ARGUMENT

THE BRIEF IN OPPOSITION WRONGLY SEEKS TO AVOID CONSIDERATION OF THE CONGRESSIONAL INTENT IN ENACTING UMTA SECTION 13(c), AND DOES NOT SET FORTH REASONS SUFFICIENT TO WARRANT DENIAL OF THE PETITION.

The pivotal question in this case is "whether Section 13(c) of the Urban Mass Transportation Act . . . creates a private federal cause of action for employees of local

transit authorities which have received federal funds under the Act." (Pet. Appx. at 2a). If such a private cause of action does not exist, then the principles of federalism embodied in the limited grant of power to the federal courts require that this case, and others like it, be decided in state courts, under the applicable state contract law. Contrarily, if such a private cause of action is found to exist, this Court must countenance the creation of a new body of federal common law to govern municipal transit labor relations, judicially fashioned by those lower courts which, like the Sixth Circuit's majority here, find "*national* labor policy" in a statute which provides no substantive rules of decision.

The Union has opposed the petition for a writ of certiorari, suggesting that no dispute concerning the issues in this case can properly exist. Abandoning the reasoning of the majority opinion of the Sixth Circuit, the Union contends that the Court should not consider whether the Congress intended to create an implied private cause of action under UMTA Section 13(c), asserting that the analysis is set forth in *Cort v. Ash*, 422 U.S. 66 (1975), and its progeny, "does not properly apply" to this case. (Brief in Op. at 17). Instead, the Union would have the Court rely upon a series of cases decided under the Interstate Commerce and Railway Labor Acts, and upon the Union's tautological statement that a contract is judicially enforceable. (Brief in Op. at 10, 17). The Union urges the Court to apply those Interstate Commerce and Railway Labor Act decisions without careful consideration of their logical and legislative underpinnings, and to find a grant of federal jurisdiction in the private contractual arrangements at issue here, simply because those agreements may have been contemplated by a federal statute.

The Union's reasoning must fail because the federal courts *are*, of course, of limited jurisdiction. The "threshold question" before any federal court considering its jurisdiction is clearly whether the Act, under which a plaintiff purports to assert federal jurisdiction, creates not only a federal right, but also a federal cause of action. *National*

R.R. Passenger Corp. v. Passenger Ass'n, 414 U.S. 453, 456 (1974); *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 128-29 (1974). As Professor Wright has noted:

> There is little difficulty if federal law provides both the substantive right and a remedy for that right. In those cases jurisdiction is taken as a matter of course. Similarly, jurisdiction will be found — assuming that the requisite amount in controversy is present — if federal law grants the substantive right and it is held that a federal remedy fairly may be implied from that right. If the federal law provides the substantive right only, but does not give a remedy, either expressly or by implication, the remedy must come from state law and federal jurisdiction will be denied.[1]
>
> (13 *C. Wright, Federal Practice and Procedure*, § 3562, at 411-412).

It is easily apparent, then, that the "fact that a contract is subject to federal regulation does not, in itself, demonstrate that Congress meant all aspects of its performance or non-performance to be governed by federal law rather than by state law applicable to similar contracts in businesses not under federal regulation." *Ivy Broadcasting Co. v. American Tel. & Tel.*, 391 F.2d 486, 490 (2d Cir. 1968). *See also Pan American Petro. Corp. v. Sup. Ct. of Del.*, 366 U.S. 656 (1961); *Phillips Petro. Co. v. Texaco, Inc., supra;* and *McFaddin Express, Inc. v. Adley Corp.*, 346 F.2d 424, 426 (2d Cir. 1965), *cert. denied* 382 U.S. 1026 (1966). Equally apparent should be the conclusion that, if "governed . . . by State law applicable to similar contracts in businesses not under federal regulation", disputes concerning the interpretation and application of Section 13(c) Agreements are not properly the subject of federal jurisdiction, but *are* properly relegated to the state courts for decision. *See Wright, supra* § 3522 at 50. The state courts have not been reluctant to entertain the Union's suits to interpret or enforce municipal transit

[1] *Citing, inter alia, Wheeldin v. Wheeler*, 373 U.S. 647 (1963) and *Prescription Plan Serv. Corp. v. Franco*, 552 F.2d 493, 495-496 (2nd Cir. 1977).

labor agreements, and to grant relief, when appropriate. In at least two cases, brought by the Union and cited in its Brief in Opposition, State courts in California have been called upon to resolve municipal transit labor disputes arising from Section 13(c) Agreements. *See Local 192 v. Alameda-Costa Transit District,* No. 513665-4 (Sup. Ct. of Calif.); and *Division 276 v. Stockton Metropolitan Transit District,* No. 146157 (Sup. Ct. of Calif.), *cited* in the Brief in Opposition at 6-7 n.5.[2] In at least two other cases, transit labor unions have filed suit against municipal transit systems in state courts, seeking to enforce what the Union believed were rights under collective bargaining agreements, *Local 589, etc. v. MBTA,* C.A. No. 45919 (Suffolk, Mass. Sup. Ct.), *cited* in *Local Div. 589, etc. v. Massachusetts,* 511 F. Supp. 312 (D. Mass.), *modified* Appeal Nos. 81-1180, 1198 and 1219 (1st Cir., Sept. 30, 1981), or under state collective bargaining laws, *see United Transp. Union v. L.I.R.R.,* 634 F.2d 19, 21 (2nd Cir. 1980), *cert. granted* ___ U.S. ___, 69 L. Ed. 2d 970 (1981), before resorting to the federal courts. *See also Local Div. 732 v. MARTA,* Civ. No. 67766 (Sup. Ct., Fulton Co., Ga. 1980). Relief for the unions is clearly available in the state courts.[3]

There is no presumption, as the Union appears to suggest, that disputes concerning transit labor agreements are cognizable by the federal courts and must be "transferred" to the state courts for decision (Brief in Op. at 24-26). Rather, given the limitations placed on federal courts by Article III of the Constitution, principles of federalism dictate the opposite presumption. *Wright, supra* § 3522 at 50. In the absence of a clearly expressed congressional intention to create a federal cause of action, therefore, the courts should be cautious to suppose that by enacting a statute, like UMTA, without any expressed or implied

[2] Curiously, the Union characterizes both cases as decisions of the "District Court." Brief in Op. at 6-7 n.5.

[3] An additional remedy is, of course, available in the authority of the Secretary of Transportation to terminate federal funding of mass transit systems which fail to comply with the requirement of UMTA Section 13(c).

remedy, the Congress meant to shift private litigation from state to federal tribunals. *See, Moore's Federal Practice,* ¶ 0.62 [2. – 2], at 668.

The Union avers that UMTA Section 13(c) is simply a recasting of Section 5(2)(f) of the Interstate Commerce Act, and that the decisions which have interpreted the latter section control the outcome of this case. The Union ignores completely the expressed congressional intention that protective arrangements made pursuant to UMTA Section 13(c) "normally will be the product of local bargaining and negotiations," [1964] U.S. Code Cong. & Admin. News at 2584-85, and legislative history which reveals the Congress' clear understanding of the uniquely local nature of municipal transit labor disputes, *see Local Div. 589, etc. v. Massachusetts,* Supplemental Petition Appx. at 19a-34a. Instead, the Union asserts that arrangements made under UMTA Section 13(c) must be regarded as identical to arrangements made under the Interstate Commerce and Railway Labor Acts as part of Congress' statutory scheme to treat interstate commerce and the nation's railroads in a nationally uniform manner. Rejecting the need for any search for the intentions of Congress in enacting UMTA Section 13(c), by its contention that *Cort v. Ash, supra,* "does not properly apply" to this case, the Union suggests that the decisions in *Norfolk & Western Rwy. Co. v. Nemitz,* 404 U.S. 37 (1971), *Brotherhood of Locomotive Engineers v. Chicago & Northwestern,* 314 F.2d 424 (8th Cir. 1963), and *International Ass'n of Machinists v. Central Airlines,* 372 U.S. 682 (1963), are dispositive, and eliminate the need for scrutiny of the Congress' stated purposes. Not even the Sixth Circuit was willing to forego the reasoned analysis required by *Cort v. Ash* and its progeny. Indeed, as even the majority of the Sixth Circuit found here, on closer analysis the Union's exclusive reliance upon *Nemitz, Locomotive Engineers,* and *Central Airlines,* must fail.

At issue in *Nemitz* was a claim for damages incurred by reason of a railroad's alleged violation of an Interstate Commerce Commission order, granting the railroad au-

thority to purchase part of the Penn Central's Toledo Division, and including protective arrangements under the provisions of 49 U.S.C. § 5(2). Pursuant to its mandate under § 5(2)(f), the Commission imposed certain conditions upon the railroad for protection of employees who might be adversely affected by the purchase. Although this Court addressed the substantive question raised by the parties,[4] it did not, as the Union suggests, consider the jurisdictional contentions made in the district court,[5] and the court of appeals.[6]

It is clear from the lower court opinions in *Nemitz*, that the plaintiffs described their cause of action as one to enforce the terms of an ICC order, over which the federal courts were expressly granted jurisdiction under 28 U.S.C. § 1336 and 49 U.S.C. §§ 9 and 16(12). No comparable jurisdictional grants or remedial provisions may be found in the terms of UMTA. Unlike the Interstate Commerce Act, which created a comprehensive regulatory scheme, UMTA did not confer upon any agency "exclusive and plenary" authority, or pre-empt contrary state and municipal law.[7] Nor are the Union's purported rights in this case grounded in any "order" incorporating the terms of the 13(c) agreement it seeks to enforce.[8] Rather, as District

[4] The precise question considered by the *Nemitz* court was whether the final sentence of § 5(2)(f) of the Interstate Commerce Act permitted the parties affected by an ICC consolidation order to supersede the labor protection provisions, established as a condition in the order, by entering subsequently into a collective agreement changing the terms of such protective provisions. Answering that question, this Court held that an agreement entered into by the railroad and the plaintiffs' Union after the entry of an ICC order could not "abrogate" the plaintiffs' rights to the compensation established in the labor protection provisions of the *order*.

[5] *Nemitz v. Norfolk & Western Ry. Co.*, 287 F. Supp. 221 (N.D. Ohio 1968) (jurisdiction); 309 F. Supp. 575 (N.D. Ohio 1969) (merits).

[6] *Nemitz v. Norfolk & Western Ry. Co.*, 436 F.2d 841 (6th Cir. 1971).

[7] *See* 49 U.S.C. § 5(11).

[8] *See McGlaughlin v. Penn Central Co.*, 384 F. Supp. 179, 182 (S.D.N.Y. 1974).

Judge Wellford correctly found in this case, the Union's rights are contained only in a common-law contract, the Section 13(c) Agreement itself, which, in the absence of diversity, may be enforced only in state court.[9]

In *Locomotive Engineers*, the Eighth Circuit considered a union's complaint to require arbitration under the terms of a stipulation concluded by the union and a railroad in order to gain the ICC's approval of the railroad's purchase of the assets of another railroad. Contesting the applicability of the stipulation, the railroad insisted upon arbitration under the Railway Labor Act, 49 U.S.C. § 156. Hence, the issue in *Locomotive Engineers* was "not one of interpretation of collective agreements, but rather a question of "the interpretation and effect of Section 5(11) of the Interstate Commerce Act on an agreement for the protection of employees approved by the Interstate Commerce Commission under Section 5(2) of the Act," and made part of the ICC's order authorizing the purchase of one railroad by another. *Id.* at 426, 428. Only choosing between the application of the Interstate Commerce and Railway Labor Acts, the *Locomotive Engineers* court noted the "plain language of § 5(11) conferring exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal [and state] law." *Id.* at 431-432, 429. Expressly limiting its decision to the facts of the case, *Id.* at 434, the court reviewed the legislative history of the Interstate Commerce Act, and found that application of the Railway Labor Act would defeat the purpose Congress expressed in the Interstate Commerce Act. *Id.* at 431.

[9] Interestingly, in *Nemitz*, the Supreme Court stated that the protections afforded by § 5(2)(f) of the Interstate Commerce Act, to which the Union mistakenly draws an analogy, need not be included in any collective agreement, "mandatory" or otherwise, but may be provided by the Interstate Commerce Commission itself, in an order which it issues to govern the relationship between an interstate carrier, whose merger with another carrier the order approves. 404 U.S. at 42. Hence, not even § 5(2)(f) of the Interstate Commerce Act, strictly construed, "mandates" any agreement.

The Interstate Commerce Act contains express remedial provisions, conferring upon private parties a right of action to enforce any ICC order, including an order such as the one governing the parties' relations in *Locomotive Engineers,* 49 U.S.C. § 16(12). It was not strictly necessary therefore, for the *Locomotive Engineers* court to imply such a remedy. *See also* 28 U.S.C. § 1336. Nonetheless, the considerations applied by other courts in finding such an implied remedy, at least those considerations applied prior to *Cort v. Ash,* may all be found in *Locomotive Engineers.*[10]

Lastly, in *Central Airlines,* this Court considered the enforceability of an order entered by a "system board of adjustment", created by agreement of the parties in compliance with § 204 of the Railway Labor Act, 45 U.S.C. § 184. Noting the "steady congressional intent to move toward a reliable and efficient system for the settlement of grievances" through "compulsory system, group, or regional boards", the Supreme Court found Congress, intent for the "statutory command", which it set forth in the Railway Labor Act, "to be legally enforceable in the courts", *Id.* at 690 (emphasis supplied.)

Rejecting *Central Airlines'* contention that the complaint did not disclose a federally created cause of action, the Court found that the suit was not one "involving an aspect of a federal law which is only collateral or remote or a case where state and federal laws are so blended as to

[10] First, the Court in *Locomotive Engineers* found that the ICC order at issue in the case, as well as various provisions of the Interstate Commerce Act, contemplated protection of railway employees adversely affected by the merger which the ICC ordered authorized. *Id.* at 427. Second, while not expressly addressing the intention of Congress to create or deny a private federal remedy, such a remedy would be consistent with the purposes expressed by Congress in the Act. *Id.* at 430-432. And, finally, because of the express preemption of contrary State law contained in § 5(11) of the Act, the Court might well have found that private actions, such as the one before it, were not "traditionally relegated to state law," or involving of a matter "basically the concern of the states." It was appropriate in *Locomotive Engineers,* therefore, to infer a cause of action based solely on federal law.

present a serious question of the scope of the 'arising under' provision of §§ 1331 and 1337", and held that "the complaint in this case for jurisdictional purposes, presented a substantial claim having its source in and arising under the Railway Labor Act . . .," *Central Airlines, supra* at 684, 695, 696. Consequently, in *Central Airlines,* the Supreme Court inferred a private "right to recover", or remedy, from the terms of the Act, to enforce *orders* entered by Railway Labor Act boards of adjustment.

Unlike the situation in *Central Airlines,* no system of dispute resolution has been prescribed by Congress to govern the parties' relations in this case. Nor does UMTA contain any suggestion that "the needs of the subject matter manifestly call for uniformity. *Id.* at 691-692. Rather, UMTA leaves "state and federal laws . . . so blended as to present a serious question of the scope of the arising-under provision of § 1331 or § 1337," *Id.* at 695-696.

In short, the decisions in *Nemitz, Locomotive Engineers,* and *Central Airlines* are distinguishable, and do not eliminate the necessity of an inquiry under *Cort v. Ash* and its progeny to determine the intentions of Congress in enacting UMTA Section 13(c). That inquiry, the Petitioner suggests, was wrongly conducted in the majority opinion of the Sixth Circuit in this case, and led it to the sweeping implication of a vast new body of federal transit labor law from the language of Section 13(c). Such an implication of federal jurisdiction and federal common law, in the face of congressional silence, should *not* be left unreviewed and undisturbed by this Court.

Finally, the Union improperly asserts for the first time before this Court, that certiorari should be denied because the lower court could conceivably have entertained the Union's action under the Civil Rights Act, 42 U.S.C. § 1983. Brief in Op. at 29, *citing Maine v. Thiboutot,* ___ U.S. ___, 100 S. Ct. 2502 (1980). The weakness of the Union's whole analysis is magnified by the circularity of its reasoning. The Civil Rights Act, of course, only protects its beneficiaries from deprivation of rights secured by the

Constitution and laws of the United States, by persons acting under color of law. In the present case the "rights" which the Union seeks to protect were created only by a common-law contract. Without implication of a right to recover, or remedy, from the terms of UMTA Section 13(c), no federally protected right is involved, and jurisdiction of the Union's complaint cannot be found to exist under the Civil Rights Act.

For the foregoing reasons, and for the reasons set forth in the Petition for a Writ of Certiorari and the Supplemental Brief in Support of the Petition, the Petitioner respectfully requests that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

Respectfully submitted,

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JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE,

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vs.

LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Motion for Leave to File Brief as Amicus Curiae in Support of Petitioner on Behalf of the American Public Transit Association and Brief of Amicus Curiae in Support of Petitioner on Behalf of the American Public Transit Association

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Motion for Leave to File Brief as Amicus Curiae in Support of Petitioner on Behalf of the American Public Transit Association

The American Public Transit Association (APTA), pursuant to Supreme Court Rule 42, hereby moves for leave to file a brief as amicus curiae in support of the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit. Respondent has refused to consent to the filing of

said brief, necessitating the instant motion. Petitioners' letter of consent to such appearance by amicus is on file with the Court.

APTA, a private non-profit corporation, is the national representative association of organizations and entities involved in various capacities in the provision of public mass transit services. APTA's voting members include more than 300 transit system operators, the vast majority of which are public entities, which provide more than 90% of all mass transit rides in the United States. Also included as associate members of APTA are manufacturers and suppliers to the industry, state Departments of Transportation and political subdivisions of state and local public bodies. The vast majority of APTA's mass transit system members receive federal financial assistance under the Urban Mass Transportation Act and, therefore, are subject to the provisions of Section 13(c) of the Act, 49 U.S.C. § 1609(c), respecting the making of arrangements to protect the interests of transit employees affected by a federally assisted project.

APTA regularly represents its members' interests in both the state and federal courts. Such representation has included participation as amicus curiae in other matters before this Court.

The issues presented in this case concern the interpretation and method of enforcement of a "13(c) agreement." Most APTA members are parties to other 13(c) agreements, negotiated between a local transit agency and its transit union pursuant to Section 13(c). As labor costs comprise approximately 70% of a transit system's operating expenses,[1] the interpretation of the meaning of such agreements has a direct and immediate impact upon APTA members. The decision of the Sixth Circuit not only requires federal court review of local transit agency management decisions upon suit by a local union, but it also recognizes a *federal transit labor law*, purportedly arising from the requirements of Section

1. Comptroller General Report to Congress, "Soaring Transit Subsidies Must Be Controlled" 13 (February 1981).

13(c), that could be construed to supersede state public employee law.

Such a major change in transit labor relations would expand the scope of the Urban Mass Transportation Act far beyond the expressly stated intent both of Congress and of the Act's own sponsors. Because it recognizes federal subject matter jurisdiction and a federal private right of action based upon an alleged breach of a 13(c) agreement, the Sixth Circuit's instant decision will necessarily subject a wide range of local transit issues to federal court review. This result is of obvious concern to all of APTA's public transit system members who have received federal financial assistance under the Act.

The necessity of local control of mass transit operations is of critical importance to local agencies and communities providing such services. Since World War II, the cost of providing mass transit services in the nation's urban areas has increased markedly as a result of general inflation, the rising costs of fuel and equipment, and increased labor costs.[2] Indeed, these increased costs, coupled with the fiscal limitations imposed on many local communities, have created serious financial difficulties for urban mass transit systems, resulting during the past several months in an unprecedented three-month shutdown of the system in Birmingham, Alabama,[3] major fare increases in Chicago, Illinois,[4] and many other cities, and emergency state appropriations in Boston, Massachusetts.[5]

The local public transit agencies which comprise the majority of APTA's voting members are vested with the primary responsibility for controlling such costs. These agencies, therefore, must have

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2. *Id.* at 9-10.

3. New York Times, at 1 (July 2, 1981).

4. *Ibid.*

5. *Local Division 589, A.T.U. v. Commonwealth of Massachusetts,* 511 F. Supp. 312 (D. Mass. 1981).

the flexibility to devise specific solutions to local problems in light of the particular sociological, economic and political context, which includes the particular enabling legislation and local public employee law, under which each agency functions. A local agency, however, cannot function effectively if, as in Boston,[6] management decisions even tenuously affecting labor, which are designed to contain costs and increase efficiency, must first be reviewed and approved by the federal courts before such solutions may be implemented.

It is APTA's position that the Sixth Circuit erred in deciding that federal subject matter jurisdiction and a private federal right of action exist for an alleged breach of a local collective bargaining agreement or a 13(c) agreement, merely because a local public transit agency has accepted necessary financial assistance under the Act, and has further erred in purporting to recognize a new federal transit labor law which, contrary to the intent of Congress, could supersede state public employee law. A decision with such a dramatic impact upon labor relations in the transit industry and which adversely affects the ability of local public transit agencies to control their own operations, merits the most careful review by this Court.

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6. *Ibid.*

For these reasons and those stated in the annexed brief, it is respectfully requested that the motion of APTA for leave to file this brief as amicus curiae in support of petitioners be granted.

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QUESTIONS PRESENTED

1. Whether Congress, in enacting the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601, *et seq.*, intended to create a federal transit labor law enforceable in, and by, federal courts to govern contract disputes between public transit authorities and their employees. (Discussed in Argument I.)

2. Whether Congress, in enacting the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601, *et seq.*, intended to authorize federal courts to formulate a "federal common law" to govern contract disputes between local public transit authorities and their employees. (Discussed in Argument I.)

3. Whether an employee's, or union's, claim that a municipal transit authority breached a collective bargaining agreement executed in 1975 states a "claim arising under the laws of the United States" within the meaning of 28 U.S.C. § 1331(a) solely because the municipal transit authority received federal funds, in 1966, through a grant authorized by the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601, *et seq.* (Discussed in Argument III.)

4. Whether Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1609(c), creates a federal private cause of action for an alleged breach of a collective bargaining agreement, executed in 1975, by a municipal transit operator who received federal funds under the Act, in 1966. (Discussed in Argument II.)

TABLE OF CONTENTS

	Page
Interest of Amicus Curiae	1
Introductory Statement	3
Argument	7
I. The Urban Mass Transportation Act Does Not Create, and Congress Did Not Intend to Create, Any Body of Federal Transit Labor Law That Would Supersede Local Public Employee Law	7
II. The Urban Mass Transportation Act Does Not Create, and Congress Did Not Intend to Create, a Federal Private Right of Action to Enforce an Alleged Breach of a Collective Bargaining Agreement, Which Allegedly Constitutes a Breach of a 13(c) Agreement	14
III. An Alleged Breach of a Collective Bargaining Agreement, Which Allegedly Constitutes a Breach of a 13(c) Agreement, Does Not State a Claim Arising Under the Laws of the United States	17
Conclusion	22

TABLE OF AUTHORITIES

Cases	Pages
Bell v. Hood, 327 U.S. 678 (1946)	20
California v. Sierra Club, ... U.S. ....., 68 L.Ed. 2d 101 (1981)	14, 16
Cort v. Ash, 422 U.S. 66 (1975)	6, 15, 16
Division 1287, A.T.U. v. Kansas City Area Transit Authority, 582 F.2d 444 (8th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979)	5, 18
Florida Lime Etc. Growers v. Paul, 373 U.S. 132 (1963)	13
Grace v. Central American Ins. Co., 109 U.S. 278 (1883)	18
Gully v. First National Bank, 299 U.S. 109 (1936)	19, 20
International Association of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963)	15, 17, 21, 22
Local Division No. 714, A.T.U. v. Greater Portland Transit District, 589 F.2d 1 (1st Cir. 1978)	5, 19
Local Division 519, A.T.U. v. LaCrosse Municipal Transit Utility, 585 F.2d 1340 (7th Cir. 1978)	5, 18
Local Division 589, A.T.U. v. Commonwealth of Massachusetts No. 81-1180 (1st Cir. 1981)	8, 22
National League of Cities v. Usery, 426 U.S. 833 (1976)	16, 21
National Railroad Passenger Corp. v. Passenger Assn., 414 U.S. 453 (1974)	19
Northwest Airlines, Inc. v. Transport Workers Union, ... U.S. ....., 67 L.Ed. 2d 750 (1981)	18
Owen Equipment Etc. Co. v. Kroger, 437 U.S. 365 (1978)	18
Pennhurst State School v. Halderman, ... U.S. ....., 67 L.Ed. 2d 694 (1981)	15, 20

TABLE OF AUTHORITIES — Pages

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 13
Robertson v. Cease, 97 U.S. 646 (1878) 18

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 14
Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 17
Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979) 14

United Transportation Union v. Long Island Railroad, 634 F.2d. 19 (2d Cir. 1981), *cert. granted*, ... U.S. ....., 69 L.Ed. 2d 970 (1981) 21
Universities Research Assn. v. Coutu, ... U.S. ....., 67 L.Ed. 2d 662 (1981) 14, 16

Table of Authorities

Constitution and Statutes

	Pages
United States Constitution	
10th Amendment	21
28 U.S.C. § 1331	18
29 U.S.C.	
§ 152	16
§ 185	16
45 U.S.C.	
§ 547	19
§ 565	19
49 U.S.C.	
§ 1601, et seq.	passim
§ 1601	3, 15, 16, 21
§ 1601a	4, 15, 21
§ 1601b	15
§ 1602	4
§ 1604	4
§ 1606	4
§ 1607	4
§ 1608	4, 16
§ 1609	passim

Supplemental Authorities

109 Congressional Record (1963)	9, 10, 11, 22
110 Congressional Record (1964)	11, 12, 13
Hearings on S. 6, Subcommittee on Housing, Banking and Currency Committee, 88th Cong., 1st Sess. 307 (1963)	8
Senate Report No. 82, Banking and Currency Committee, 88th Cong., 1st Sess. (1963)	5, 9, 20
Comptroller General Report to Congress, "Soaring Transit Costs Must Be Controlled" (February 26, 1981)	3

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Brief of Amicus Curiae in Support of Petitioner on Behalf of the American Public Transit Association

INTEREST OF AMICUS CURIAE

As discussed in the accompanying motion for leave to file brief as amicus curiae, the American Public Transportation Association (APTA) is the major representative of the interests of the American public transit industry. As noted, the vast majority of APTA's more than 300 voting members are publicly owned transit agencies, most of which, like petitioner Jackson Transit Authority,

receive or have received federal assistance under the Urban Mass Transportation Act and, as one of many conditions of such assistance, have entered into "13(c) agreements" with local unions pursuant to Section 13(c) of the Act. 49 U.S.C. § 1601, *et seq.*, 1609(c).

It is APTA's position that the issues raised by the Sixth Circuit's instant decision affect not only petitioners City of Jackson and Jackson Transit Authority (Jackson), but all public transit agencies throughout the United States. By recognizing a private right of action in the federal courts to adjudicate a dispute arising out of an alleged breach of a collective bargaining agreement, and by recognizing the existence of an undefined body of federal transit labor law under the Urban Mass Transportation Act superseding local public employee law, the Sixth Circuit has significantly interfered with local public employee labor relations and has violated Congress' expressly stated intention that the operation of the nation's urban mass transit systems be left to local management and control.

As discussed above, local control of mass transit operations is of critical importance to the successful provision of such services to the local communities. In light of the varied mass transit needs of each community, and the particular sociological, economic and political contexts in which these needs are addressed, it is imperative that the local public transit agencies which are responsible for containing the increasing costs of urban mass transit services have the flexibility to devise specific solutions to specific local problems without being required, upon suit by a local union, to obtain the approval of the federal courts in order to implement such solutions. Local control of mass transit services, therefore, as Congress itself recognized, is the most appropriate operating form for a local public transit agency.

As the Department of Labor certified 1,767 13(c) agreements during 1979-1980, and is expected to certify approximately 1,200 additional agreements during 1981, as but one condition of grant

approval under the Act,[1] the impact of the Sixth Circuit's decision upon the nation's public transit systems and upon a federal judiciary already overburdened with cases ostensibly based on Section 13(c)[2] will clearly be substantial. By its recognition of a body of federal labor law that could supersede state and local public employee law, the Sixth Circuit's instant decision departs even further from the intended meaning and purpose of the Urban Mass Transportation Act than previously reported cases involving Section 13(c). The proliferation of litigation involving Section 13(c), and potentially involving the many other provisions of the Act, will have disastrous consequences upon local public transit agencies, the public they serve, and the already overburdened federal courts. A decision in such fundamental error merits this Court's most careful review.

INTRODUCTORY STATEMENT

The Urban Mass Transportation Act was enacted by Congress in 1964 in response to a growing financial crisis in the provision of mass transportation services in the nation's urban centers. 49 U.S.C. § 1601, *et seq.* Expressly recognizing the threat to the general welfare of these rapidly expanding urban centers caused by the deterioration or inadequate provision of mass transit services, Congress concluded that federal financial assistance was essential to any solution of the problem. 49 U.S.C. § 1601(a). Accordingly, the Act was expressly designed to assist the development of mass transportation facilities, equipment, techniques and methods, § 1601(b)(1), encourage the establishment of areawide mass transit systems, § 1601(b)(2), and supplement state and local financial support of such systems. § 1601(b)(3).

Significantly, based upon its recognition of the uniquely local nature of the provision of urban mass transit services, Congress

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1. Comptroller General Report to Congress, "Soaring Transit Subsidies Must Be Controlled" 90 (February 26, 1981).

2. Petition at 23-24. See footnotes 19-21.

provided that transit systems receiving federal assistance were to be locally managed and operated "as determined by local needs," *ibid,* and expressly prohibited the federal government from regulating "in any manner the mode of operation of any mass transportation system" or prescribing or regulating its rates, tolls or other charges for service. § 1608(d). Congress required the federal government to cooperate with local communities receiving assistance under the Act, § 1607(a), and further emphasized that the primary responsibility for the operation and provision of mass transit services was to be left to the states and local communities:

> "It is the purpose of this Act to create a partnership which permits the local community, through Federal financial assistance, to exercise the initiative necessary to satisfy its urban mass transportation requirements." § 1601a.

As petitioner has discussed, the Act delineates numerous conditions of grant approval, a number of which require that certain groups or interests, such as private transportation companies, charter and school bus operations, and elderly, handicapped or displaced persons, in addition to labor, be afforded a measure of protection by the grant recipient. See, *e.g.,* §§ 1602(a)(2)(A), 1602(a)(3), 1602(e), 1602(f), 1602(g), 1604(l), 1604(m), 1606, 1607, 1609(c).[3] Clearly only one of many conditions of grant approval, Section 13(c) of the Act, 49 U.S.C. § 1609(c), requires that "fair and equitable arrangements [be] made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance." Although the statute does not require a negotiated agreement, these arrangements generally take the form of a "13(c) agreement" between the local public transit

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3. For *none* of these interests did Congress even allude to the existence of federal subject matter jurisdiction or a private right of action to enforce any purported federal right under the Act. To sustain such an implication under Section 13(c) may well require a similar implication of jurisdiction and a private federal remedy for each of these special interests, all in the face of Congress' virtually tangible silence on the issue.

agency and the local union. Although the statute lists certain subject categories to be addressed by these arrangements, it does not require that they contain any specific terms or conditions. Indeed, Congress expressly intended that these specific terms and conditions would be the "product of local bargaining and negotiation. . . ." S. Rep. No. 82, 88th Cong., 1st Sess., Banking and Currency Committee 28 (1963).

As the Sixth Circuit expressly recognized, both the Act and its legislative history are entirely silent as to the enforcement of such arrangements. In particular, neither the Act nor its legislative history establish or even discuss the existence of subject matter jurisdiction or any private right of action in federal court as a vehicle for such enforcement.

Nonetheless, Section 13(c) has already formed the ostensible basis of a significant quantity of litigation in federal court. In these cases, a local union has generally claimed that the defendant public transit agency has denied an alleged federal right, such as "interest" arbitration of the terms of a new collective bargaining agreement, which is ostensibly guaranteed by Section 13(c) although the only reference to the subject, if any, is in the 13(c) agreement. Although the District Courts have reached different conclusions, four Circuit Courts of Appeal, now including the Sixth Circuit, have determined that federal subject matter jurisdiction and a federal private right of action exist under the Urban Mass Transportation Act for an alleged breach of a 13(c) agreement. *Local Division No. 714, A.T.U. v. Greater Portland Transit District,* 589 F.2d 1 (1st Cir. 1978); *Local Division 519, A.T.U. v. LaCrosse Municipal Transit Utility,* 585 F.2d 1340 (7th Cir. 1978); *Division 1287, A.T.U. v. Kansas City Area Transit Authority,* 582 F.2d 444 (8th Cir. 1978), *cert. denied,* 439 U.S. 1090 (1979).

The Sixth Circuit, however, has compounded the error made in these decisions. In this case, the gravamen of respondent Union's action is its claim that Jackson is bound by a 1975 collec-

tive bargaining agreement which Jackson contends is invalid both because it was personal to T. O. Petty, an individual with whom the City had contracted in 1966 to manage and operate its public transit services, and because it had not been ratified by the City's Board of Commissioners. The Union's claim, therefore, is based entirely upon a collective bargaining agreement negotiated and executed under the common and statutory law of Tennessee, and resolution of the parties' dispute should turn entirely upon an application of that law by the courts of Tennessee. The case presents no controversy in any way turning upon the validity or interpretation of any federal law, including Section 13(c) of the Urban Mass Transporation Act. Yet, by a series of unfounded inductive leaps, the strictly local question presented in this case has been transformed by the Sixth Circuit into an issue involving not merely a purported breach of a 13(c) agreement, but also a violation of the federal statute itself.

Thus, reversing the District Court, the Sixth Circuit concluded that the 13(c) agreement is "so intertwined with the Federal statutory scheme," the Union's claimed right "arises under" the Urban Mass Transportation Act. Petition: Appendix at 5a-6a. Additionally, ignoring the legislative history of the Act, ignoring the import of this Court's most recent decisions, and misconstruing the Act in light of the analysis of *Cort v. Ash,* 422 U.S. 66 (1975), the Sixth Circuit also concluded that a private Federal remedy may be inferred from Section 13(c) for an alleged breach of a 13(c) agreement. Appendix: at 8a-14a. Significantly, in so deciding, the Sixth Circuit purported to analyze the legislative intent of Section 13(c) and concluded that "section 13(c) reflects *national* labor policy" which, save for a prohibition against public employee strikes, could supersede all state public employee law affecting *"all other* collective bargaining rights . . . ." *Id.* at 12a; emphasis in original.

An examination of the legislative history of Section 13(c), however, reveals that the Sixth Circuit, as well as the other

Circuits that have considered the statute, have entirely distorted the meaning of the Act. Congress clearly did not intend Section 13(c) to create, and certainly did not intend the judiciary to create, a substantive body of federal law that would supersede state public employee law. No "national labor policy" supports an inference of federal subject matter jurisdiction or a private federal remedy under the Act. The Sixth Circuit's instant decision is fundamentally in error and should be reversed.

ARGUMENT

I. The Urban Mass Transportation Act Does Not Create, and Congress Did Not Intend to Create, Any Body of Federal Transit Labor Law That Would Supersede Local Public Employee Law.

Underlying the Sixth Circuit's recognition of federal jurisdiction and a federal private right of action is its fundamental misunderstanding of both the purpose of the Urban Mass Transportation Act, which has been discussed above, and, most importantly, the express intention of Congress that state and local public employee law would in no way be preempted or superseded by Section 13(c). Thus, the Sixth Circuit purports to analyze the legislative history of Section 13(c) and concludes:

> "It is indisputable that Section 13(c) reflects *national* labor policy . . . . Senator Morse . . . assured his colleagues that state laws forbidding public employee strikes would supersede national labor policy, but only where the right to strike was concerned; *all other* collective bargaining rights would be protected." Appendix at 12a; emphasis in original.

Like the other Circuits, the Sixth Circuit fails to comprehend, and thereby substantially distorts, the quite limited federal policy underlying Section 13(c). Ignoring the extensive legislative history of Section 13(c), these courts have assumed the existence of a federal labor policy underlying the statute and, based on this premise, have inferred federal subject matter jurisdiction and a

private federal remedy under the Act. Compounding these errors, the Sixth Circuit quotes Senator Morse out of context and thereby distorts the import of the legislative history. Examination of this history, however, shows all these analyses to be fundamentally flawed, for the legislative history of few other statutes more clearly or more thoroughly reveals Congress' intent not to supersede state law.[4]

The introduction of Section 13(c) in the Senate in 1963, as a proposed amendment to a bill designed to provide desperately needed financial and technical aid to local public transit agencies, engendered considerable debate as to whether the amendment would create a body of federal labor law that would preempt state public employee law. In response to this concern, the *proponents* of the amendment repeatedly assured its opponents that Section 13(c) was not intended to preempt such state law in any manner.

Thus, in the hearings before the Housing Subcommittee of the Senate Committee on Banking and Currency, Secretary of Labor Wirtz replied to Senator Tower's question as to whether the proposed labor protective provision would "supersede State laws that prohibit public employees from striking":

> "I think . . . that there could be no superseding of State laws by a provision of this kind. That is the assumption on which we are proceeding."
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> Hearings on S.6, 88th Cong., 1st Sess., 312 (1963).

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4. On the eve of filing this brief, the First Circuit rendered its decision in *Local Division No. 589, A.T.U. v. Commonwealth of Massachusetts*, No. 81-1180 (1st Cir. 1981), wherein, for the first time, a Court of Appeal thoroughly analyzes the legislative history of Section 13(c). Significantly, the Court's analysis agrees in every respect with that of amicus. Not only does the First Circuit conclude, based upon the "repeated" assurances of Secretary of Labor Wirtz and the sponsors of Section 13(c) in both houses of Congress, that Section 13(c) does not preempt, and could not be used to preempt, state public employee law, but the Court also expressly rejects the Sixth Circuit's cursory analysis of the legislative history of the statute which amicus challenges herein.

The Report of the Senate Committee on Banking and Currency concurred with Secretary Wirtz:

> "In regard to the question as to whether these provisions would supersede State labor laws, the committee concurs in a statement made by the Secretary of Labor 'that there could be *no superseding of State laws* by a provision of this kind.' " S. Rep. No. 82, *supra*, at 29; emphasis added.

During the initial debates on the amendment in the Senate, however, Senator Goldwater expressed considerable concern that the proposed amendment would be construed to preempt state public employee law. 109 Cong. Rec. 5414-5417 (1963). Senator Williams, one of the amendment's strongest supporters, unequivocally stated in response:

> "This provision is truly ancillary to the thrust of the transportation program. . . . [¶] The legislative history has to be corrected, however, because if the bill shall be enacted, we must have a record that will show that the bill does not preempt State law, it does not control or dominate with irrevocable authority local situations." *Id.* at 5417.

Senator Miller, an opponent of the proposed amendment, immediately sought further clarification from Senator Williams:

> "MR. MILLER: Is it the intention, so far as [Senator Williams] and the committee [on Banking and Currency] are concerned . . . that the provision . . . shall not be inconsistent with State law?
>
> MR. WILLIAMS of New Jersey: Is that another way of saying that it cannot preempt or be a substitute for State law?
>
> MR. MILLER: I should think so.
>
> MR. WILLIAMS of New Jersey: That is my answer. It was the same answer the Secretary of Labor [Wirtz] gave to the committee." *Ibid.*

In further response to Senator Goldwater's concern, Senator Sparkman also stated:

> "I know that the language was written, it was done clearly with the idea that while there would be a continuation of collective bargaining rights, it was not intended to supersede State laws. I believe the questioning of the Secretary of Labor indicates our concern about that. It was not our intention to supersede State laws and we do not intend, I am sure, to do so. We do not believe that the language has that effect." *Id.* at 5418.

Subsequently, Senator Sparkman reaffirmed the intent of the proponents of the measure:

> "All the way throughout consideration of the bill our purpose was to draft provisions which were not inconsistent with State law. We repeated that statement over and over. We have repeated it on the floor this afternoon. *It was not intended that the language was to supersede or override state law in any way whatsoever.*"
>
> *Id.* at 5433; emphasis added.

Two days later, in the dialogue misconstrued by the Sixth Circuit, Senator Morse spoke in support of his proposed amendment. *Id.* at 5670-5672. Although Senator Goldwater focused his opposing remarks upon the amendment's possible effect on state law prohibiting public employee strikes, his entire colloquy with Senator Morse makes clear his basic concern, whether the proposed amendment would generally preempt state public employee law. *Id.* at 5672-5674. Moreover, the same dialogue also makes clear that by "all other collective bargaining rights," the language seized upon and extracted out of context by the Sixth Circuit, Senator Morse was referring to contractual terms not otherwise affected by state public employee law. *Id.* at 5673. Indeed, when Senator Goldwater questioned whether the proposed amendment would in any manner vitiate the exemption from federal labor regulation afforded

local public entities under the Taft-Hartley Act, Senator Morse responded:

> "MR. MORSE: The very reason that the language in the bill reads as it does is in order to make it clear that the Taft-Hartley exemptions are not changed by the amendment. I cannot emphasize the point more than I have done. . . . *It deals with municipal and State problems, not Federal problems.*
>
> MR. GOLDWATER: Then, as a final word, the language proposed . . . or the language . . . as it now stands *in no way would preempt state law.*
>
> MR. MORSE: The answer is yes. . . ."
> *Id.* at 5674; emphasis added.

The debates in the House of Representatives the following year are even more dispositive of the issue.

On June 24, 1964, Representative Taft rose in opposition to the proposed labor provision on the ground that it might preempt state and local law governing public employees. 110 Cong. Rec. 14903 (1964). Representative Rains of Alabama, the author of the House bill, however, stated in response:

> "It is not going to affect any work laws; it is not going to affect the right of any State in any shape, form or fashion. . . . [T]here can be no law written that will enable any strike against the town, city, State or National Government, and there will be nothing in that which will attempt to involve it here." *Id.* at 14906.

In the debates the following day, Representative Rains and other proponents of the Act again repeatedly made clear that the proposed amendment was not intended to preempt state public employee law as a condition of grant approval. Thus, Representative Rains stated in his opening remarks:

> "I am going to state a plain fact. There is no featherbedding in this bill. I state another plain fact. There is no violation

> of anyone's right-to-work law in any state of the Union in this bill. I happen to come from a State that has one, and I have taken particular care." *Id.* at 14977.

Notwithstanding Representative Rains' statement, the labor provision continued to be opposed on the ground that it could be interpreted so as to supersede state public employee law. *Id.* at 14977. Representative Multer, a principal sponsor of the proposed bill, characterized the attacks as "strained interpretations," and concluded:

> "I trust that no one, after enactment of this bill, will consider any of the remarks made against this amendment as part of the legislative history to be relied upon in interpreting or enforcing the same." *Id.* at 14978.

Having lost his attempt to defeat the labor provision, Representative Taft proposed a further amendment expressly stating that the required fair and equitable arrangements would not be inconsistent with state law. *Id.* at 14979. Upon the defeat of Taft's amendment, the proponents of the Act were asked whether this rejection implied "that the [Rains] amendment . . . would infringe upon the laws of the various States?" *Id.* at 14980. In response, Representative Multer stated unequivocably:

> "There is no attempt in this bill or in any amendment that has thus far been adopted to infringe upon the laws of any State or locality. . . .
>
> I repeat what I said before. Nothing in this bill and nothing in any amendment thus far adopted will infringe upon local law, whether it be a State or municipality." *Ibid.*

The ensuing dialogue further establishes beyond any question that Congress did not intend Section 13(c) to preempt any state public employee law. Following Representative Multer's statement, Representative Hallek questioned the significance of Representative Rains' opposition to an amendment that would have expressly served to "preserve State and local rights." *Ibid.*

"Mr. RAINS. I appreciate the chastisement. . . . I would have the gentleman understand, plainly and simply, I have spent many a day and week working on the bill. . . . I tell him that there is not one line in this bill that would vitiate in any way any State or local law in Alabama or Indiana. I want the record to be clear."

Mr. OLIVER P. BOLTON. . . . From refusal to accept this [Taft] amendment, can it logically be concluded that the [Rains] amendment we just did accept warrants the breaking of State law in the 'arrangements'?

Mr. RAINS. If I understand the gentleman's question, he is asking whether the amendment we just adopted would provide for violating any State law.

Mr. OLIVER P. BOLTON. That is correct.

Mr. RAINS. The answer to that is definitely no. It would not violate it." *Ibid.*

The intent of the framers of Section 13(c) in both the Senate and House of Representatives not to preempt any state public employee law could hardly be more clear. In response to repeated questioning, the proponents of Section 13(c) made evident in virtually every possible way that no such preemption was intended to be, or would in fact be, the effect of Section 13(c). Of course, it has long been a basic tenet of our federal system that state law will not be deemed preempted by federal law unless Congress clearly and manifestly has so ordained. *Florida Lime Etc. Growers v. Paul*, 373 U.S. 132, 142 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In this case, Congress clearly and unmistakably did *not* intend to preempt state public employee law. The Sixth Circuit's dangerous and erroneous conclusion purporting to recognize a federal transit labor law, however, could lead to that precise result.

II. The Urban Mass Transportation Act Does Not Create, and Congress Did Not Intend to Create, a Federal Private Right of Action to Enforce an Alleged Breach of a Collective Bargaining Agreement, Which Allegedly Constitutes a Breach of A 13(c) Agreement.

Based upon its misreading of the legislative history of the Act, and opening the way for an unwarranted proliferation of federal litigation involving the numerous provisions of the Act in addition to Section 13(c), the Sixth Circuit has concluded that a federal private right of action may be inferred from Section 13(c) for an alleged breach of a 13(c) agreement. Following the First and Seventh Circuits, the Sixth Circuit essentially reasons that it must infer a private right of action because Congress must have intended the 13(c) agreements to be enforceable by their parties in any forum having jurisdiction over the matter. Petition: Appendix at 8a-9a. In short, the Sixth Circuit bases its inference, not on any evidence in the statute or in the legislative history of a Congressional intent to create a private federal remedy, of which there is none, but on its unfounded belief that such a remedy in federal court would be appropriate.

As this Court has repeatedly made clear, however,

> "whether a statute creates a private right of action is ultimately 'one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.' "

Universities Research Assn. v. Coutu, ... U.S. ...., 67 L.Ed. 2d 662, 675 (1981), quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979).

> "The federal judiciary will not engraft a remedy on a statute, no matter how salutory, that Congress did not intend to provide."

California v. Sierra Club, ... U.S. ...., 68 L.Ed.2d 101, 110 (1981). See also, *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 15-16 (1979).

It is undisputed, however, and the Sixth Circuit explicitly recognized, that the legislative history of the Act nowhere indicates that a private federal remedy was intended by Congress. Indeed, nowhere does Congress refer to any enforcement mechanism for arrangements made pursuant to Section 13(c) and, of course, the statute itself establishes no such mechanism. The lack of any such indication is entirely consistent with the legislative history of Section 13(c) which affirmatively establishes, beyond any question, that Congress did not intend Section 13(c) to supersede state public employee law. There is absolutely no evidence or indication of any kind, upon which the Sixth Circuit may base its conclusion, that Congress intended to establish a private remedy in federal court for such a claim.

Ironically, further compounding its misunderstanding of its responsibility under this Court's recent decisions, the Sixth Circuit also erroneously analyzed the Urban Mass Transportation Act in light of the four factors set forth in *Cort v. Ash, supra,* 422 U.S. 66, 78, quoted by the Sixth Circuit, Appendix at 9a-10a.

First, contrary to the Sixth Circuit's conclusion, the Act was not intended to *especially* benefit either unions or labor, but focuses exclusively upon the rejuvenation of the Nation's ailing urban mass transit systems. Indeed, these specific purposes of the Act are expressly and extensively set forth in the statute itself. 49 U.S.C. §§ 1601, 1601a, 1601b. When interpreting any statute, the Court must look to the law as a whole, to its entire object and policy, rather than to any isolated part. *Pennhurst State School v. Halderman,* .... U.S. ...., 67 L.Ed. 2d 694, 708 (1981); *International Assn. of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 686-687 (1963). Analysis of neither the Act nor its legislative history reveals any intent to especially benefit labor or any other special interest mentioned in the Act.

Moreover, although Section 13(c) recognizes certain labor interests, the statute confers no rights directly upon employees; it

merely requires a grant recipient to make fair and equitable arrangements, which need not even be contractual in nature, to protect certain interests of affected employees. That Section 13(c) may benefit affected employees is not dispositive; Congress must have otherwise indicated that it intended any such benefit to be enforced by private litigation in federal court. *Universities Research Assn. v. Coutu, supra,* .... U.S. ...., 67 L.Ed. 2d 662, 676-677. Not only is there no such indication in this case, but the legislative history of Section 13(c), the second *Cort* factor, affirmatively indicates the contrary.

Such an analysis of the first two *Cort* factors is dispositive. *California v. Sierra Club, supra,* .... U.S. ...., 68 L.Ed. 2d 101, 110. Congress clearly did not intend to create, and did not in fact create, a private federal remedy under the Act. Further analysis of either the purposes of the Act or whether such disputes are traditionally left to local resolution under state law is unnecessary.

Consideration of these last two *Cort* factors, however, further confirms that Congress did not intend to create a private federal remedy. First, the principal and overriding purpose of the Act was to provide *supplemental* assistance to local public transit agencies in the nation's urban centers. Although federal resources were to be made available for this purpose, Congress expressly prohibited federal involvement in the operation or mangement of these local agencies. 49 U.S.C. §§ 1601(a)(3), 1608(d). Second, as discussed above, the legislative history of the statute makes abundantly evident that Congress did not intend to preempt, supersede or displace state or local public employee law. Resolution of disputes regarding the terms of local public employment is "traditionally relegated to state law in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." *Cort v. Ash, supra,* 422 U.S. 66, 78; *National League of Cities v. Usery,* 426 U.S. 833 (1976). See also, 29 U.S.C. §§ 152(2), 185.

It would, therefore, be inconsistent with both the purposes of the Urban Mass Transportation Act and the policy of limited federal intervention in the labor relations of local public entities to infer a private federal remedy under the Act for an alleged breach of a 13(c) agreement. The special province of the federal courts is to apply a uniform federal law only in the context of federal legislation that is genuinely comprehensive and of nationwide application. *International Assn. of Machinists v. Central Airlines, Inc., supra,* 372 U.S. 682, 691; *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 456 (1957). The Urban Mass Transportation Act is not such a piece of federal labor legislation. The Act neither requires nor encourages, indeed, it precludes, the implication of a federal private right of action as found by the Sixth Circuit in this case.

III. An Alleged Breach of a Collective Bargaining Agreement, Which Allegedly Constitutes a Breach of a 13(c) Agreement, Does Not State a Claim Arising Under the Laws of the United States.

Initially, amicus reemphasizes that the basic issue in this case has absolutely nothing to do with Section 13(c). The parties dispute only whether Jackson is bound by a local collective bargaining agreement, which should be resolved solely under the laws of the State of Tennessee. Although respondent Union has purported to allege a breach of a 13(c) agreement in an attempt to engraft a federal question upon its state claim, any such right it may have necessarily derives from, and comes into existence only through this private agreement, and does not arise under the Urban Mass Transportation Act or any other federal law.

In concluding that the breach of contract alleged in this case implicates rights inextricably "intertwined with the federal statutory scheme," the Sixth Circuit has essentially concluded that Section 13(c) encompasses the specific terms not only of a

13(c) agreement but also a common collective bargaining agreement. Appendix at 5a-6a. By virtue of the instant decision, therefore, any alleged breach of a local collective bargaining agreement necessarily involves a federal right purportedly guaranteed by Section 13(c). This pernicious result, which will embroil the federal courts in myriad disputes over the various terms of local collective bargaining agreements, was clearly not intended by Congress and, under well settled standards, cannot constitute a sufficient federal question to support jurisdiction under 28 U.S.C. § 1331(a).

Jurisdiction in the Federal Courts is, of course, strictly limited, *Northwest Airlines, Inc. v. Transport Workers Union*, ... U.S. ...., 67 L.Ed.2d 750, 765 (1981), and this Court has emphasized that these "limits upon federal jurisdiction . . . must be neither disregarded nor evaded." *Owen Equipment Etc. Co. v. Kroger*, 437 U.S. 365, 374 (1978). Accordingly, it has long been settled that, unless the contrary affirmatively appears, the courts will presume they lack jurisdiction over a controversy. *Grace v. American Central Ins. Co.*, 109 U.S. 278, 283 (1883); *Robertson v. Cease*, 97 U.S. 646, 649 (1878).

Conspicuously absent from the Urban Mass Transportation Act is any mention whatsoever of federal jurisdiction, or a private right of action, in favor of labor or any other special interest mentioned in the Act. Notwithstanding Congress' silence on the issue, the Sixth Circuit has ignored the constitutionally based presumption against the assumption of jurisdiction[5] and, like the

5. The three other Circuits which have considered the issue have also ignored this fundamental principle. Thus, although it conceded that the issue was "not free from doubt," the Eighth Circuit in *Division 1287, A.T.U. v. Kansas City Area Transit Authority, supra*, 582 F.2d 444, 450, and the Seventh Circuit in *Local Division 519, A.T.U. v. LaCrosse Municipal Transit Utility, supra*, 585 F.2d 1340, 1345-1346, both concluded, without consideration of the legislative history of Section 13(c), that a 13(c) agreement was sufficiently "infused" with "minimum standards" and "prerequisites" that an alleged breach of an agreement required reso-

Union itself, has engrafted onto the Union's claim under the 1975 collective bargaining agreement rights ostensibly deriving from Section 13(c) itself. Such a theory of federal jurisdiction, which purports to encompass a local dispute entirely unrelated to Section 13(c), is fundamentally inconsistent with this Court's repeated emphasis upon the limited nature of federal jurisdiction.[6]

To state a claim arising under the laws of the United States, the federal right asserted must be an actual, essential and dispositive element of plaintiff's cause of action. *Gully v. First National Bank*, 299 U.S. 109, 112 (1936).

> "The right . . . must be such that it will be supported if the . . . laws of the United States are given one construction or effect and defeated if they receive another." *Id.* at 112-113.

Writing for a unanimous Court, Justice Cardozo emphasized the critical distinction between the *origin* and the essential *nature* of a claim of right under federal law. Concluding that "not every question of federal law in a suit is proof that a federal law is the basis of the suit," *id.* at 115, Justice Cardozo observed:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily . . . one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting

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lution under federal law. Significantly, in *Local Division 714, A.T.U. v. Greater Portland Transit District, supra*, 589 F.2d 1, 6-8, the First Circuit conceded that the alleged federal right to interest arbitration under the 13(c) agreement was merely contractual in nature and did not derive from the statute, but concluded that an alleged breach of the agreement violated an implied statutory mandate to comply with 13(c) arrangements.

6. In sharp contrast is Congress' express creation of jurisdiction and a private right of action in favor of employees for breach of an agreement executed under a provision of the Rail Passenger Service Act otherwise analogous to Section 13(c). See, 45 U.S.C. §§ 547, 565(a) and (b); *National RR Passenger Corp. v. Passengers Assn.*, 414 U.S. 453 (1974).

the validity, construction or effect of such a law, upon the determination of which the result depends."
Id. at 114.[7]

The Sixth Circuit's decision notwithstanding, however, Section 13(c) is only a minor provision of a plain and simple funding statute, *Pennhurst State School v. Halderman, supra,* .... U.S. ...., 67 L.Ed. 2d 694, 703-704, 710, which creates no rights which involve the specific terms of a 13(c) agreement. As discussed above, the statute merely requires that a local public transit agency make fair and equitable arrangements, certified by the Secretary of Labor, to protect certain interests of employees affected by the proposed grant. The statute is not only silent as to the specific terms of any such arrangement, but Congress expressly assumed that such terms would be the "product," not of federal law, but of "local bargaining and negotiation. . . ." S. Rep. No. 82, *supra,* at 28. Thus, the only federal "right" created by the statute is to the certification of these arrangements. Once such arrangements are certified, the statute neither expresses nor contemplates any further federal involvement.

Contrary to the holding of the Sixth Circuit, therefore, an alleged breach of a 13(c) agreement implicates no question of federal law or policy, for the execution and approval of the agreement in the first instance fulfills the limited federal policy expressed in the statute. The Sixth Circuit's decision, like those of the other Circuits finding subject matter jurisdiction for an alleged breach of a 13(c) agreement, fundamentally confuses the *origin* of the agreement with the true *nature* of its specific terms for purposes of a jurisdictional analysis. *Gully v. First National Bank, supra,* 299 U.S. 109, 114.

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7. Further extending this latter principle, this Court has also emphasized that a suit may be dismissed on jurisdictional grounds, even if facts are alleged which ostensibly involve federal law, if the alleged federal claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Bell v. Hood,* 327 U.S. 678, 682-683 (1946)

Moreover, like the other Circuits before it, the Sixth Circuit has misconstrued and erroneously relied upon this Court's leading decision in *International Association of Machinists v. Central Airlines, Inc., supra,* 372 U.S. 682. Far from supporting a finding of jurisdiction, the principles upon which this Court in *Central Airlines* found subject matter jurisdiction under the Railway Labor Act establish that no such jurisdiction exists under the Urban Mass Transportation Act for an alleged breach of a 13(c) agreement.

As this Court recognized in *Central Airlines,* the Railway Labor Act is a comprehensive and detailed statute regulating the labor relations of transportation industries which are extensively involved in interstate commerce. *Id.* at 685-692. Accordingly, because the regional grievance boards there involved were expressly required by statute as an integral part of a pervasive and nationwide labor dispute resolution scheme which constituted the principal focus of the entire Act, *id.* at 686-687, 689, this Court concluded that Congress necessarily intended the Act to be enforced by a federal law of uniform application. *Id.* at 691-692.[8]

The Urban Mass Transportation Act is manifestly not such a statute. Not only does the Act have virtually nothing to do with labor, but the aid to local public transit agencies that constitutes its central purpose was intended to free, not regulate, these agencies, 49 U.S.C. §§ 1601(b)(3), 1601a, and even the proponents of Section 13(c) assured Congress that this provision was

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8. The applicability of the Railway Labor Act to state and local public entities may, of course, be limited by the 10th Amendment. *National League of Cities v. Usery, supra,* 426 U.S. 833; *United Transportation Union v. Long Island Railroad,* 634 F.2d 19 (2d Cir. 1981), *cert. granted,* ..... U.S. ....., 69 L.Ed. 2d 970 (1981).

"truly ancillary to the thrust of the transportation program . . . ." 109 Cong. Rec. 5417 (Remarks of Sen. Williams).[9]

The presupposition upon which the Sixth Circuit concluded that federal question jurisdiction exists under Section 13(c) constitutes an erroneous and disruptive interpretation of the Urban Mass Transportation Act. Arrangements made as one condition of grant approval were not intended by Congress to embody federal policy such that an alleged breach of the specific terms of a 13(c) agreement would require the intervention of an already overworked federal judiciary for its resolution.

CONCLUSION

For the foregoing reasons, amicus curiae American Public Transit Association respectfully requests this Court to grant the instant Petition to review the decision of the Sixth Circuit.

Dated: October 26, 1981

Respectfully submitted,

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9. Although the First Circuit notes in its most recent decision that it had previously found federal jurisdiction and a private federal remedy under Section 13(c) for an alleged breach of a 13(c) agreement, its own analysis of the legislative history of the statute, coupled with its analysis of *Central Airlines* and the Railway Labor Act, both of which agree in every respect with the corresponding analyses set forth herein, compel the conclusion that no such federal jurisdiction or remedy exist under Section 13(c). *Local Division No. 589, A.T.U. v. Commonwealth of Massachusetts, supra,* No. 81-1180.

Respondent's Reply Brief

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No. 81-411

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE,

Petitioners,

v.

LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI AND IN RESPONSE TO THE BRIEF OF AMICUS CURIAE AMERICAN PUBLIC TRANSIT ASSOCIATION

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TABLE OF CONTENTS

	Page
ARGUMENT	1
A. Amicus' Contentions Are Not At Issue Here..	1
B. Congress Intended Its Laws To Be Enforced	1
C. APTA's Legislative History Is Wrong	3
1. APTA Confuses The Applicable Legal Standard	3
2. The Proposal In Committee	4
3. The Williams' Proposal	6
4. The Morse Amendment That Became The Law	7

TABLE OF AUTHORITIES

Cases:	Page
Cort v. *Ash*, 422 U.S. 66 (1975)	2
Division 589, Amalgamated Transit Union v. *Commonwealth of Massachusetts, etc.*, Nos. 81-1180, 1198 and 1219 (1st Cir. Sept. 30, 1981) *modified on rehearing en banc*, October 23, 1981	1
Florida Lime, etc. Growers v. *Paul*, 373 U.S. 132 (1963)	3
Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977)	3,4
King v. *Smith*, 392 U.S. 309 (1968)	4
Pennhurst State School v. *Halderman*, —— U.S. ——, 101 S. Ct. 1531 (1981)	2
Rice v. *Santa Fe Elevators Corp.*, 331 U.S. 218 (1947)	4
San Diego Building Trades Council v. *Garmon*, 359 U.S. 238 (1959)	4

Other Authorities

PAGE

National Labor Relations Act
29 U.S.C. § 151 *et seq.* 9, 10

Urban Mass Transportation Act, 49 U.S.C. § 1601 *et seq.* .....passim

Hearings on H.R. 3381, Before House Comm. on Banking and Currency, 88th Cong., 1st Sess. (1963) 5

Hearings on S. 6, Subcommittee on Housing of the Senate Comm. on Banking and Currency, 88th Cong., 1st Sess. (1963) 5

49 C.F.R. § 604.10 *et seq.* 2

49 C.F.R. § 605.1 *et seq* 2

49 C.F.R. § 609.1 2

109 Cong. Rec. 5417 – 5675 (1963) .....passim

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI AND IN RESPONSE TO THE BRIEF OF AMICUS CURIAE AMERICAN PUBLIC TRANSIT ASSOCIATION

Respondent, Local Division 1285, Amalgamated Transit Union, pursuant to Rule 22.6 of the Supreme Court Rules, hereby supplements its Brief.

ARGUMENT

A. Amicus' Contentions Are Not At Issue Here.

Amicus, American Public Transit Association (hereinafter, "APTA"), like amicus National Institute of Municipal Law Officers (hereinafter, "NIMLO"), seeks to raise here the question at issue in *Division 589, Amalgamated Transit Union* v. *Commonwealth of Massachusetts, etc.*, Nos. 81-1180, 1198 and 1219 (1st Cir. Sept. 30, 1981) *modified on rehearing, en banc,* October 23, 1981 (hereinafter, "*Boston*"). In its Supplemental Brief in Response to Petitioners' Supplemental Brief (hereinafter, "Resp. Supp. Br. to Pet.") and in its Supplemental Brief in Response to the Brief of Amicus NIMLO (hereinafter, "Resp. NIMLO Br."), filed this day, Respondent has addressed at length the impropriety of considering that question here. Rather than burden the Court again, Respondent refers to those Briefs; Resp. Supp. Br. to Pet., pp. 2-5; Resp. NIMLO Br., pp. 1-4.

B. Congress Intended Its Laws To Be Enforced.

APTA elides the essential question by contending that the inability to preempt state law means that Respondent cannot enforce the federal law at all. (APTA Br., p. 2). As set forth in Resp. NIMLO, Br., pp. 4-7, APTA's argument fails, because (1) the *Jackson* Court did not rule on the question of whether, in cases of direct conflict, UMTA supersedes local public employee law; (2) Congress does not enact unenforceable laws; thus, on the question actually at issue here — jurisdiction and Respondent's claim — APTA's arguments would produce a totally unacceptable result.

APTA makes a number of other untenable contentions. One, APTA contends that Congress did not intend private enforcement of any other conditions on UMTA funds. (APTA Br., p. 4). The authorities largely contradict this

assertion. However, assuming, for argument, the truth of APTA's contention, the statutory provisions APTA cites largely mandate purely public administrative duties for the Secretary of Transportation in determining that the general public interest is protected, as is required of any public administrator of a federal spending statute. Where the interests of third parties are involved, the provisions APTA cites direct commitments to be made directly to and action by the Secretary of Transportation. Moreover, for many of these benefitted classes, the Secretary has long-standing, administrative programs for enforcement: 49 C.F.R. § 604.10 *et seq.* (charter operators) 49 C.F.R. § 605.1 *et seq.* (school bus operators); 49 C.F.R. § 609.1 (elderly and handicapped).

Predictably, APTA next contends that an examination of the whole law reveals that Congress did not intend to enforce § 13(c). (APTA Brief, pp. 14-17). Such an assertion is contrary to both the clear language of § 13(c) and the legislative history. Section 13(c) is an explicit federal "condition". In *Pennhurst State School* v. *Halderman*, —— U.S. ——, 101 S. Ct. 1531 (1981), cited by APTA, pp. 15, 20, this Court opined that language of "condition" present here would create enforceable rights and obligations. *Id.*, at 1539, 1540, 1542. The legislative history of § 13(c) also reveals that Congress considered the provisions thereof to be an integral part of the overall statute:

> As we know, any legislation which is intended to provide Federal aid for the purpose of strengthening and improving our urban area mass transportation systems must be concerned with another highly important factor, the stability of labor relations. 109 Cong. Rec. 5670 (1963).

Third, APTA contends that the Court erred by misapplying *Cort* v. *Ash*, 422 U.S. 66 (1975). (APTA Br. pp. 6, 15, 16). As set forth in Respondent's Main Brief, whether Congress intended the § 13(c) agreement to be enforced by the parties thereto rests on analysis of numerous factors and much evidence and has been ruled on by five Appeals Court panels. It cannot be disposed of by *ad hominem* assertions. (APTA Br., p. 15). *See*, Resp. Main Br., pp. 9-28.

Finally, APTA, like NIMLO, contends, without explanation, that:

> . . . the basic issue in this case has absolutely nothing to do with Section 13(c). The parties dispute only whether *Jackson* is bound by a local collective bargaining agreement. . . . (APTA Brief, p. 17).

See, NIMLO Brief, pp. 6-7.

C. APTA's Legislative History Is Wrong.

APTA's severely edited version of the UMTA's legislative history should be of no relevance here. But in order that this Court may rule on *certiorari* without being in any way misled by APTA's drastically edited and misinterpreted excerpts, Respondent sets forth here relevant portions of the legislative history, including an overview of the development of § 13(c), so that this Court may see Congress' intent actually emerge. As this presentation demonstrates, APTA's contention that Congress intended to expose the § 13(c) obligations to nullification by state law is false.

1. APTA Confuses The Applicable Legal Standard.

Some clarification of terms regarding the relationship between federal and state law is in order. The relationships fall into three categories. The first is preemption of conflicting state law by operation of the Supremacy Clause of the United States Constitution ("conflict preemption"). Under the Supremacy Clause, the existence of federal law invalidates state action that conflicts irreconcilably with the federal mandate. *Jones* v. *Rath Packing Co.,* 430 U.S. 519, 525-26 (1977). Section 13(c) was neither an automatic mandate nor a prohibition of law, but a proffer of terms, to be accepted or declined. Accordingly, Congress properly denied that the enactment of § 13(c), standing alone, would preempt state law.

Second, Congress, by acting under the Commerce Clause, may preempt the states from legislating in a whole area, even absent a direct conflict, because of the significance of the federal interest in the area ("preemption of the field"). Here, Congressional intent to occupy the field is necessary. *See, Florida Lime, etc. Growers* v. *Paul,* 373

U.S. 132, 142 (1963); *Rice* v. *Sante Fe Elevators Corp.*, 331 U.S. 218, 230 (1947); (APTA Br., at p. 13); *Jones* v. *Rath Packing Co., supra.* Thus, while the National Labor Relations Act occupies the field largely, *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 238, 243-45 (1959), § 13(c) does not. Accordingly, in enacting § 13(c), various legislators properly denied that § 13(c) would function similiarly.

The third legal relationship results from the binding nature of federal commitments. This legal relationship is set forth in a series of cases, set forth as recently as *Pennhurst, supra,* 101 S. Ct., at 1539 (1981), where this Court, citing *King* v. *Smith,* 392 U.S. 309 (1968), stated:

> . . . legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the states agree to comply federally mandated conditions.[1]

Section 13(c) and the actions taken pursuant to § 13(c) create this third kind of relationship. Accordingly, the legislative history of § 13(c), and particularly the debate on the federal/state relationship, can be understood properly only in this context. As Sen. Morse, § 13(c)'s chief sponsor, summed up (addressing the final version of § 13(c)):

> . . . some changes are going to have to be brought about in some of the States to conform to the Federal policy. 109 Cong. Rec. 5675 (1963).[2]

2. The Proposal In Committee.

Early in the consideration of the bill, the administration

---

1. In *King* v. *Smith,* this Court held:
   There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid. 392 U.S. at 333, n. 34.

2. This same analysis—properly understanding the differences among conflict preemption, occupation of the field, and binding federal commitments also disposes of APTA's quotations from the House debate. Section 13(c) was largely formulated in the Senate and not meaningfully changed in the House.

proposed a weaker version of § 13(c). There, APTA quotes Labor Sec. Wirtz as testifying:

> I think . . . that there could be no superseding of State laws by a provision of this kind. That is the assumption on which we are proceeding. (APTA Br., p. 8).

APTA omits the rest of Wirtz' testimony, which sets forth the initial formulation of § 13(c) (immediately thereafter):

> SEN. TOWER: . . . in my state it is prohibited by law for public employees to strike and this would not affect that?
>
> SEC. WIRTZ: When you say "not affect it", that would be a somewhat broader question surely on the question of superseding—I say "surely," to the best of my knowledge—that is true. Now, whether there would be an effect I think is a somewhat different question. Hearings on S. 6, Subcommittee on Housing of the Senate Comm. on Banking and Currency, 88th Cong., 1st Sess. (1963) (hereinafter, "Sen. Hearings"), at 312.[3]

Thus, from the beginning, Wirtz acknowledged that, although the law would not function like conflict preemption or occupation of the field, the state must comply with the federal conditions.

Even in the Hearings, the Congressmen from states with anti-bargaining laws understood completely that the binding nature of federal commitments would cause them to forego incompatible state laws. Labor Representative Bernard Cushman testified:

> One way, as a condition for the receipt of Federal, funds, is that they do not have to do it at all. If they do not want any Federal money they can do whatever they please. . . . Hearings on H.R. 3381, Before House Comm. on Banking and Currency, 88th Cong., 1st Sess. (1963) (hereinafter, "House Hearings"), at 633.

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3. Several Senators properly understood that Sec. Wirtz' testimony would not protect them against compliance with Federal commitments:

> Sen. Goldwater: "If we were to lean on such testimony, it would be like leaning on an old, rotten fence which is likely to fall down because there is nothing to hold it up." 109 Cong. Rec. 5419.

Congressman Harvey responded, stating forthrightly, Amici's position here: that the states should be free to have both federal money and inconsistent state law:

> . . . people [from Texas] are not in any mood even for one minute that they do not have to accept this money if they do not want to. From what they said in their letter, they very much feel that *they have as much right as anybody else to accept that money and they do not want such a provision in the Act if it passes. House Hearings,* at 640 (emphasis added).

Cushman replied in a very forthright manner:

> . . . let them do it on their own. Do not come here and get federal money to help them break the Union. *Id.*

The Committee compromised, rejecting the proposal that § 13(c) be limited to protections already allowed by state law, but amending § 13(c)(2), of the bill to delete the requirement of continued collective bargaining and provide instead for "encouragement of continued collective bargaining." 109 Cong. Rec. 5417-18.

3. The Williams' Proposal.

On the Senate floor, debating the motion to delete all of § 13(c), Senate sponsors were attacked at the outset for attempting to "supersede" state law in subsection 13(c)(2). They defended the proposal on the basis of the language of "encouragement" added in Committee.

Sen. Sparkman:

> We rewrote it to read "The encouragement of the continuation of collective bargaining rights."
>
> * * *
>
> . . . the language was written, it was done clearly with the idea that while there would be an *encouragement of a continuation of collective bargaining rights, it was not intended to supersede State laws.* 109 Cong. Rec. at 5418.[4]

---

4. Astonishingly, APTA's quotation of this statement to this Court, allegedly drawn from the legislative history of § 13(c), 109 Cong. Rec. 5418, eliminates the phrase "encouragement" altogether without even an ellipsis to indicate that APTA has deleted out the critical language being debated. Compare, 109 Cong. Rec. 5418 with

(Footnote continued on next page)

Thus, an accurate version of the debates reveals that they were ineluctably tied to the language of § 13(c) as it then existed ("encouragement of the continuation of collective bargaining"), but not as it was enacted into law ("the continuation of collective bargaining"). Thereafter, the motion to delete § 13(c) was defeated. 109 Cong. Rec. 5420.

Next, the opponents of § 13(c) proposed, unsuccessfully, to amend § 13(c) to provide that:

> . . . whatever conditions the Administrator shall impose must be consistent with the laws of the State in which the project is situated. 109 Cong. Rec. 5422.

Next, Sen. Tower proposed, unsuccessfully, to amend the sub-section providing for encouragement of collective bargaining—to limit it to arrangements already allowed by state law. 109 Cong. Rec. 5423, 5582. Sen. Williams again defended the bill *based solely on the language of "encouragement"*:

> The provision is that there shall be encouragement of the continuation of collective bargaining rights. I do not see how encouragement could ever be inconsistent with any law—a local law, a State law, or a constitution. Encouragement relates to hope. 109 Cong. Rec. 5423.

4. The Morse Amendment That Became The Law.

Two days later, Sen. Morse proposed the amendment that ultimately became § 13(c). 109 Cong. Rec. 5626-27, 5669-70. Sen. Morse alerted the Senate that his version of § 13(c)

(Footnote continued from preceding page)

APTA Brief, p. 10. By this unacknowledged editing, APTA eliminates the critical change in § 13(c) in the Senate—the deletion of the phrase "encouragement", a hard-fought change intended to put substance in the federal conditions, even if state laws would have to fall as a consequence. *Infra,* pp. 8-10. Similarly, at this same point where the Senators were debating the meaning of this one provision of the bill as then worded, Sen. Williams said, as quoted by APTA, that . . . "it does not control or dominate with irrevocable authority local situations." (APTA Br., p. 9, citing 109 Cong. Rec. at 5417). However, APTA omits the next two sentences of Sen. Williams' statement, clearly tying his disclaimer directly to the then extant version of the bill: "The bill provides for the *encouragement of collective bargaining.* That does not put the force of a mandate on a community." *Id.* (emphasis added).

protected "*national labor policy.*"[5] 109 Cong. Rec. 5670 (emphasis added).

Sen. Morse then spoke definitively on the issue APTA would present to this Court:

> What we have . . . is a conflict between a sound Federal public policy and a policy of a State. The State can continue its State policy if it wishes to; but . . . the State should not be allowed to receive federal money . . . 109 Cong. Rec. 5675.

Second, Sen. Morse also explicitly rejected Sen. Williams' earlier version of subsection 13(c)(2) with its use of the wording "encouragement", 109 Cong. Rec. 5675, thereby conclusively rebutting any relevance of the earlier statements, even had they been accurately presented. (APTA Br., pp. 9, 10). As Sen Morse said:

> . . . that language uses the word "encourages" the maintenance of the status quo, but does not require it. What does "encourage" mean? It cannot be subjected to a definition that gives any real protection to labor. *Id.*

In thus revising the language, Sen. Morse openly acknowledged its present impact, as set forth at pp. 4-5 of present draft, *supra*:

> . . . some changes are going to have to be brought about in some of the States to conform to the Federal policy. 109 Cong. Rec. 5675.

Sen. Morse was also very clear on what his amendment would not do. Thus, Sen. Morse's colloquy with Sen. Goldwater, quoted by APTA out of context (APTA br., App. 10, 11), must be read in context. In context, Sen. Goldwater

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5. See, NIMLO Br., p. 5, n. 3.

Sen. Morse admitted that the proposals to protect labor rights in transit had been attacked repeatedly by Senators from states with anti-bargaining laws; he admitted that the Senators "disagree[d]" about whether state anti-bargaining policy or federal policy should govern, where a local public body had federal funds, 109 Cong. Rec. 5671. Sen. Morse then stated his position.

> . . . we cannot justify, as a matter of public policy, the use of Federal dollars by a local community . . . the expenditure of which would result in worsening the present collective bargaining rights of free labor which operates that transit system. *Id.*

had not asked whether a state could make binding federal commitments under § 13(c) and then apply contrary state law to escape them. He had asked only whether *subsection* 13(c)(1), guaranteeing "rights, privileges and benefits in existing collective bargaining agreements" would incorporate strike rights from the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (hereinafter, NLRA). 109 Cong. Rec. 5672-3. Senator Morse properly answered that subsection 13(c)(1) did not preserve the right to strike, since subsection 13(c)(1) applied only to rights found in traditional collective bargaining agreements. Thus,

> In that case, the State law would supervene. The rights we are talking about are those spelled out in the collective bargaining agreement—wages, hours, conditions of employment, pensions, welfare funds. This has nothing to do with the right to strike. In this sense, the right to strike is not part of the collective bargaining agreement. 109 Cong. Rec. 5673.

When, immediately thereafter, Sen. Goldwater pressed him again on the same question — *whether subsection 1 of § 13(c), preserving rights in existing contracts, preserved the right to strike as the NLRA had done,* Sen. Morse responded the same way.[6] Accordingly, APTA's quotations from the legislative history apply only to the questions of whether 13(c)(1) would apply the NLRA, whole cloth, to the states. That it would not do so adds nothing to a resolution of this case.

Indeed, Sen. Morse's own words absolutely repudiate any implication that § 13(c) would be less enforceable or less

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6. Their full exchange, only partially presented by APTA (APTA Br., p. 11), went as follows:

> MR. GOLDWATER: Then, as a final word, the language proposed by the Senator from Oregon or the language of the bill as it now stands in no way would preempt State law.
>
> MR. MORSE: The answer is yes; and particularly as I have mentioned. If the collective bargaining should be taken over by a public agency in the exceptional case described the right to strike against the public agency would be taken away from labor. ***But that is not a contractual right; it is not among the contractual rights the State agency must recognize in order to have an application for aid considered.*** 109 Cong. Rec. 5674 (emphasis added).

binding than the NLRA (there referred to as Taft Hartley), just because § 13(c) does not function to apply the NLRA:

> An unfair labor practice charge . . . under the Taft Hartley law . . . would be dismissed by the National Labor Relations Board *because the arrangement that was entered into would create the obligation, not the Taft Hartley law. Id.*

Last, Sens. Tower and Miller moved unsuccessfully to limit Sen. Morse's version to arrangements not inconsistent with state law. 109 Cong. Rec. 5684.[7]

Morse defended his amendment concluding:

> I want to be very frank as I say this today: In rare cases in which local law prohibits collective bargaining, federal money would not be available because it would be in conflict with the policy of the bill. *Id.*

Section 13(c) passed the Senate.

It is inconceivable that anyone could read the whole legislative history of § 13(c) and accept amicus' version of Congress' actions and words. To obtain the federal money a state had to agree to abide by the federal conditions. It could not, as *amici* would propose, take the money and run.

Respectfully submitted,

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7. Throughout the debates, but particularly after Sen. Morse's amendment, Senators Tower, Goldwater, Miller and others strenuously and consistently contended that § 13(c) would function to replace state law. 109 Cong. Rec. 5676 (Sen Tower); 5677 (Sen. Lausche); 5680 (Sen. Goldwater); 5684 ("it certainly is an indirect way of having federal law supersede State law." [Sen. Miller]).

Amicus Brief

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MOTION FILED
OCT 30 1981

No.81-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE,

Petitioners,

v.

LOCAL 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE, AND BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Institute of Municipal Law Officers (NIMLO) moves the Court for leave to file the attached brief as amicus curiae in support of the Petitioners, Jackson Transit Authority and the City of Jackson, Tennessee. The Petitioners have consented to the filing of the brief, but the Respondent has withheld consent. The letters granting and withholding consent, respectively, have been lodged with the Clerk.

NIMLO submits that its brief can assist the Court in deciding whether to grant certiorari in this case. NIMLO's interest in the issue presented in this case, namely whether Section 13(c) of the Urban Mass Transportation Act, 49 U.S.C. §1609(c), creates a private federal remedy for alleged breaches of collective bargaining agreements between public transit authorities and transit employees, is set out in the Interest of the Amicus Curiae section of the attached brief. That brief analyzes the historical development of transit operations in the United States from the days of private ownership and operation to the present situation of forced takeover and operation by state and local governments. It also considers the lack of any indication in the Act or its legislative history that Section 13(c) was intended to create a national labor policy that would displace the ability of state and local governments to structure employment relationships with transit employees in providing this essential public service.

Because of the widespread ownership and operation of transit systems by state and local governments, this case is of nationwide importance and, we submit, the attached amicus brief will assist the Court in evaluating the nationwide importance of this Court's review of the decision of the Court of Appeals.

Therefore, we urge the Court to grant NIMLO leave to file the attached brief as amicus curiae.

Respectfully submitted,

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TABLE OF CONTENTS

Page

Interest of the amicus curiae 1

Statement of the case 3

Summary of argument 5

Argument 6

I. Public transportation operations have become the function and responsibility of local governments 7

A. Government ownership and operation of transit systems is the result of the historical development of transit operations in the United States 7

B. With heavy government subsidization, public transit has become an integral component of the local government planning process for the attainment of social, economic and environmental goals 11

II. Congress did not intend, in enacting Section 13(c) of the Urban Mass Transportation Act of 1964, to create a national public transportation labor law, enforceable in federal courts, which would significantly alter or displace the ability of local governments to structure public transportation labor relations 12

Conclusion 15

TABLE OF AUTHORITIES

Page

Cases:

Alewine v. City Council of Augusta, Ga., 505 F.Supp. 880 (S.D.Ga.) 9

American Public Transit Association v. Lewis, 655 F.2d 1272 (D.C. Cir.) 11

Local Division 589, ATU v. Commonwealth of Massachusetts, Nos. 81-1180 and 81-1219 (1st Cir. Sept. 30, 1981) 13

Munn v. Illinois, 94 U.S. 113 7

National League of Cities v. Usery, 426 U.S. 833 2,12

Constitution, statutes and regulations:

Clean Air Act, 42 U.S.C. §7401 *et seq.* 8

42 U.S.C. §7506(c) 11

National Labor Relations Act, 29 U.S.C. §152(2) ..5,12,13

Rehabilitation Act of 1973, 29 U.S.C. §794 11

Urban Mass Transportation Act of 1964, 49 U.S.C. §1601 *et seq.*

49 U.S.C. §1602 9

49 U.S.C. §1604(m) 11

49 U.S.C. §1609(c) ..... *passim*

49 U.S.C. §1612 8

28 U.S.C. §1331(a) 5

Miscellaneous:

American Public Transit Association, Transit Fact Book (1978-1979 ed.) 8

109 Congressional Record 5674 (1963) 13

46 Federal Register 37488 (July 20, 1981) 11

Hearings on S.6 before the Senate Committee on Banking and Currency, 88th Cong., 1st Sess., at 312 (1963) 13

H.R. Rep. No. 88-204, 88th Cong., 2d Sess. (1963)..... 13

The Impact of Transportation on the Central Business District, Traffic Quarterly, October 1980 11

Institute of Public Administration, Financing Transit: Alternatives for Local Government, July 1979..... 8,9

University of Illinois at Chicago Circle, School of Urban Sciences, Moving People: An Introduction to Public Transportation, January 1981 8,9,10

Womack and Altschuler, An Examination of the Transit Funding Process at the Local Level, May 1979.....10

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COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed on behalf of the more than 1600 local governments, or political subdivisions of states, who are members of the National Institute of Municipal Law Officers (NIMLO). These member local governments operate NIMLO through their chief legal officer, variously called city or county attorney, corporation counsel, city solicitor or law director and other titles, with each member

local government having one vote on all actions which are cast by the organization. This brief *amicus curiae* is signed by the chief legal officers of NIMLO members on behalf of their own local government and the chief legal officers of the members of NIMLO in their official capacity.

In those cities and counties which own and operate transit systems, local government attorneys who participate in NIMLO advise local government officials on transit system employer-employee relations; they assist in negotiating contracts between municipal transit systems and their employees, both through collective bargaining, and through arbitration processes, where they exist; and they advise local governing bodies when transit employees threaten to or take strike actions. The City of Jackson, Tennessee is a member of NIMLO.

Since the commencement of public transportation service, local governments have structured their relationships with transit employees free from federal interference. The nature of public transit service has made public transit operations an integral and, by now, traditional governmental function within the meaning of our Nation's system of Federalism as expressed in this Court's decision in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976). Recently, however, the freedom of local governments to structure such labor relations has been limited, if not displaced, by the assumption of jurisdiction by lower federal courts over actions brought by municipal transit employees under the provisions of Section 13(c) of the Urban Mass Transportation Act of 1964 (UMTA), 49 U.S.C. §1609(c).

Disputes between local governments and public transit employees have long been settled without federal supervision. The recent assumption of jurisdiction by the lower federal courts of actions brought by transit unions under so-

called Section 13(c) Agreements has now opened the entire sphere of public transit labor relations to the scrutiny and regulation of the federal courts. The prospect of review of basic local government transit labor decisions, through application of a judicially fashioned "*national* labor policy," discovered by some lower federal courts in the language of UMTA, has created substantial uncertainty among cities concerning local transit labor relations.

Because of the substantial interference in traditional and integral local government functions, which continuing federal judicial scrutiny of local transit labor decisions would entail, the National Institute of Municipal Law Officers suggests that an assumption of federal jurisdiction, to entertain all suits brought under the provisions of Section 13(c) of UMTA, is both unwarranted and undesirable. Consequently, NIMLO urges reversal of the judgment rendered in this case by the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

Jackson, Tennessee is a municipality located in mid-western Tennessee. Until April, 1966, transit service in Jackson was provided by Jackson City Transit Lines, Inc., a private bus company. Faced with the prospect of losing this essential public service, the city was forced to assume ownership and operation of the service previously provided by the private transit company. Pet. App. 28a-29a.

In 1966, pursuant to state statute, Jackson created a transit authority which applied for a capital grant under the Urban Mass Transportation Act, for assistance in purchasing the private bus line, and in obtaining new buses and a

new bus maintenance facility. As a condition of federal funding, Jackson entered into a Section 13(c) Agreement which was certified by the Secretary of Labor as a "fair and equitable arrangement" for protection of Jackson's employees.[1] Pursuant to a grant contract between Jackson and the United States, Jackson was given a capital grant of $279,000.

On April 1, 1975, a collective bargaining agreement was executed by Local 1285 of the Amalgamated Transit Union, which represents Jackson's transit workers, and the individual who managed the Jackson transit system.[2] Jackson itself was not a party to the agreement. Almost immediately after execution of the agreement, Jackson's transit system manager resigned. Because that agreement had not been approved by Jackson's Board of Commissioners, in accordance with local law, Jackson notified Local 1285 that it would not be bound by the agreement. Following unsuccessful efforts by Local 1285 to obtain administrative relief from the Secretary of Labor, this action was commenced.

In the District Court, the petitioner filed a motion to dismiss the Union's complaint for want of federal jurisdiction. The motion was granted, because the Union "failed to demonstrate that federal jurisdiction exists in this case." Pet. App. 30a. Reversing the District Court's decision, the United States Court of Appeals for the Sixth Circuit found

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[1]In fact, the District Court found that the employees of the private company received a benefit, in the form of continued employment, as a result of public takeover. Pet. App. 28a-29a.

[2]This agreement was preceded by three other collective bargaining agreements, each of three years duration. Subsequent to the receipt of the initial grant from UMTA in 1966 and prior to the commencement of this suit some nine years later, Jackson had not received any federal funds for operation of the transit system. Pet. 4.

that "Section 13(c) reflects *national* labor policy," Pet. App. 12a, from which it was proper to imply a private federal remedy for any breach of a collective bargaining agreement by public transit authorities. Adopting the Union's contention that its action against Jackson, to enforce a supposedly "existing" collective bargaining agreement, "arose" under Section 13(c) of UMTA, the Court of Appeals held that the District Court was invested with jurisdiction of the Union's complaint under 28 U.S.C. §1331(a). Pet. App. 6a. Under the Court's rationale, the "*national* labor policy", whose expression was found in Section 13(c), justifies assumption of jurisdiction by the lower federal courts over all actions to enforce local transit collective bargaining agreements, or to remedy their supposed breach.

SUMMARY OF ARGUMENT

Historically, cities have granted franchises to private transit systems to occupy the public streets, and have regulated the rates charged the public for use of the private service. More recently, when faced with the termination of private transit service, cities have been forced by circumstances to purchase and operate formerly private transit systems as public functions.

Public employees are exempt from regulation by federal labor law. National Labor Relations Act, 29 U.S.C. §152(2). Nothing in the language of §13(c) of the Urban Mass Transportation Act of 1964 (UMTA), 49 U.S.C. §1609(c), or in its legislative history, suggests that Congress intended to repeal, either directly or by implication, the general exemption of local government employees from federal labor relations regulations. Section 13(c) of the

UMTA did not enact a "*national* labor policy" concerning public transit service employees, from which federal courts might imply and fashion federal common law to decide local transit labor-management contractual disputes. No federal cause of action should be implied to permit local transit employees to remedy in federal court every alleged grievance arising from local transit labor relations.

ARGUMENT

The Court of Appeals' finding that Section 13(c) of the Urban Mass Transportation Act of 1964, (UMTA), 49 U.S.C. § 1609(c), confers a private federal right of action on transit employees for alleged breaches of collective bargaining agreements was based on the absence in the Act's legislative history of any discussion of the means of enforcing Section 13(c) Agreements. Pet. App. 10a. The effect of the decision below will be to transfer to the federal courts responsibility for cases which turn on the principles of state contract law.[3] Nothing prevents these actions from being brought in the state courts where they have traditionally been brought and decided. The Court's decision ignores the reality of public transit operations today and the consequences for our Nation's system of Federalism that such a result will have.

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[3]The petitioner has collected numerous cases involving collective bargaining agreements between public transit authorities and local unions which have already been filed in the District Courts as a result of the decision below and of the other federal appellate courts. Pet. 23.

I. PUBLIC TRANSPORTATION OPERATIONS HAVE BECOME THE FUNCTION AND RESPONSIBILITY OF LOCAL GOVERNMENTS

Local governments have long been involved in the provision of transit services to the public, historically as grantors of franchises to private transit companies to occupy the public streets and as regulators of the rates charged the public for use of the service.[4] More recently, local governments have been forced to assume the role of owner and operator of mass transit systems as financially troubled private companies have ceased to do business. The rise in public ownership and operation of transit systems is largely due to the availability of federal funding for the purchase of financially ailing private systems.

A. GOVERNMENT OWNERSHIP AND OPERATION OF TRANSIT SYSTEMS IS THE RESULT OF THE HISTORICAL DEVELOPMENT OF TRANSIT OPERATIONS IN THE UNITED STATES

This dramatic and relatively recent forced rise in public ownership and operation of transit systems grew out of an overall decline in the use and revenues of the private transit industry following World War II. Both a general shift of

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[4]*Munn* v. *Illinois*, 94 U.S. 113, 125 (1876) "[In the exercise of the police power] it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen . . . and in so doing to fix a maximum charge to be made for services rendered. . . ."

population from urban to suburban areas,[5] and increased dependence upon private automobiles for transportation, contributed to a dramatic decrease in transit system ridership.[6] Increased "social" costs, incurred in providing specialized services and in achieving desired environmental and social goals,[7] inflation and increased labor costs,[8] combined with the decline in fare revenues to create ever increasing operating deficits.[9]

The options available to privately owned and operated transit systems experiencing financial difficulties were few:

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[5]Given the lower density in suburban areas, the cost of transit service per passenger greatly increased. Another phenomenon known as "peaking," or the concentration of riders during the rush hours, in combination with labor contracts requiring overtime for hours worked in excess of eight, actually makes rush hour service more costly than non-rush hour services. University of Illinois at Chicago Circle, School of Urban Sciences, *Moving People: An Introduction to Public Transportation*, January 1981, at 15, 16, 18, hereafter referred to as *Moving People.*

[6]In 1950, transit carried 13.8 billion passengers. By 1977, ridership had decreased to 5.7 billion. *Moving People, supra*, at 5.

[7]Including, for example, compliance with the Clean Air Act, 42 U.S.C. §7401 *et seq.*, see discussion at note 18, *infra*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and the Urban Mass Transportation Act of 1964, 49 U.S.C. § §1609, 1612, see discussion at note 19, *infra*.

[8]A substantial proportion (75%) of operating expenses are attributable to wages and related benefits. In 1950, the average annual transit wage was higher than the wages of manufacturing and city employees. Between 1950 and 1975 the rate of increase in transit wages was more than 50% greater than that for manufacturing employees. Institute of Public Administration, *Financing Transit: Alternatives for Local Government,* July 1979, at 8-9, hereafter referred to as *Financing Transit.*

[9]In the mid 1960s, operating costs were approximately equal to operating revenues. By 1974, operating expenses were more than one and one-half times greater than operating revenues. Small wonder that private operators quit this field of service! American Public Transit Association, *Transit Fact Book,* (1978-79 ed.), at 20-21.

raise fares, cut services and forego capital expenditures. When these measures failed to rescue the private system, the only alternative to loss of the service was for the local government to purchase and operate the system. Largely because financial support, in the form of federal funds, became available to public bodies for acquiring transit systems from private owners,[10] local governments began taking over private transit systems.[11] At present, at least 463 municipal transit systems are publicly owned. Those systems now account for 90% of the nation's transit system operating revenues, and 91% of all transit system ridership. *Alewine* v. *City Council of Augusta, Ga.*, 505 F.Supp. 880, 886 (S.D. Ga. 1981).

Since public takeover of private transit systems, those systems have ceased to operate as they did when privately owned. Increased costs are not always passed on to the consumers. Nor are fares necessarily tied to per passenger transit costs.[12] On the contrary, continually declining

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[10]With enactment of the Urban Mass Transportation Act of 1964 (UMTA), 49 U.S.C. §1601 *et seq.*, the federal government made federal funds for acquisition of private systems available. 49 U.S.C. §1602. Since the enactment of UMTA, the federal government has been heavily involved in the subsidization of public transit systems, providing 80% of the total financial assistance for capital expenditures and 10.9% of all operating assistance. *Moving People, supra,* at 70.

[11]This pattern of forced public takeover of a financially ailing private transit system was followed in Jackson. Faced with the loss of transit services provided by the private transit company, the city created the Jackson Transit Authority which applied for and was granted a $279,000 capital grant under UMTA to purchase new buses and a new maintenance facility. Pet. 14.

[12]Between 1950 and 1970, fares rose slightly less than transit costs per passenger. However, between 1970 and 1975, transit costs per passenger rose 14.3% per year while fares rose only 3.6% per year. *Financing Transit, supra,* at 8, 10.

amounts of operating expenses are recovered from fares.[13] Rather, publicly owned transit systems are supported by general tax revenues obtained from transit and non-transit riders alike, all of whom benefit directly and indirectly from public transit service.[14]

The expectation that public takeover and operation would cure the transit systems' financial woes has not materialized.[15] As public takeover occurred, public attitudes toward the financing of transit changed. There is a great reluctance to raise fares in cities experiencing public takeovers, accompanied by pressures to provide special services and higher wages to avoid transit strikes.[16]

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[13]At present, approximately 55% of operating expenses are recovered from fares. Local and regional authorities provide 22% of all operating assistance. State subsidies account for 9.45%. *Moving People, supra,* at 20.

[14]State and local tax revenues from income, property, sales, motor vehicle fuel, utility and excise taxes pay more than 50% of public transit's operating deficit. The federal government contributes about 10.9% of all operating revenues, accounting for some $2 billion in subsidies in 1978.*Id.*

[15]The following was observed in a case study of cities experiencing public takeovers.

> "In our case study cities we found a widespread expectation that public ownership and subsidization would stabilize transit finances by reducing operating costs (through new capital) and by helping to attract new riders. However, more nearly the opposite has occurred: unit costs (per vehicle mile and per passenger) have increased rapidly in constant dollars during the period of public, subsidized operation. Consequently, the amount of public support needed to continue systems operations at a given level has continued to grow rapidly. . . ." Womack and Altschuler, An Examination of the Transit Funding Process at the Local Level, May 1979, Executive Summary, at 4.

[16]*Id.*, at 18.

B. WITH HEAVY GOVERNMENT SUBSIDIZATION, PUBLIC TRANSIT HAS BECOME AN INTEGRAL COMPONENT OF THE LOCAL GOVERNMENT PLANNING PROCESS FOR THE ATTAINMENT OF SOCIAL, ECONOMIC AND ENVIRONMENTAL GOALS

As a result of public takeover and operation of transit services, transit has become an essential means of achieving governmental goals that benefit not just the transit passenger but, ultimately, society as a whole. Transportation planning figures prominently in the local comprehensive land use planning process[17] and in the governmental planning process designed to achieve cleaner air.[18] Furthermore, among the conditions to the receipt of federal funding are the requirements that special services be provided to special segments of society, such as the elderly and the handicapped.[19] It is doubtful that these governmental goals would be attainable if public takeover had not occurred.

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[17]The availability of public transportation allows land in the central business district to be used at its highest potential, for commercial office space, thus reducing its use for traffic and parking needs. The Impact of Transportation on the Central Business District, *Traffic Quarterly*, October 1980, at 523.

[18]Activities approved, supported or funded by the Department of Transportation must conform to the State Implementation Plan required under the Clean Air Act. 42 U.S.C. §7506(c).

[19]Rates for the elderly and the handicapped during non-peak hours may not exceed one-half of the rates generally applicable during peak hours. 49 U.S.C. §1604(m). The Department of Transportation (DOT) has issued an interim rule requiring recipients of federal funds to certify that "special efforts" to provide transportation that handicapped persons can use are being made. 46 Fed. Reg. 37488 (July 2, 1981). The rule is the result of the decision in *American Public Transit Association v. Lewis*, 665 F.2d 1272 (D.C. Cir. 1981) holding that regulations implementing §504 of the Rehabilitation Act of 1973 exceeded DOT's authority under that statute.

II. CONGRESS DID NOT INTEND, IN ENACTING SECTION 13(c) OF THE URBAN MASS TRANSPORTATION ACT OF 1964, TO CREATE A NATIONAL PUBLIC TRANSPORTATION LABOR LAW, ENFORCEABLE IN FEDERAL COURTS, WHICH WOULD SIGNIFICANTLY ALTER OR DISPLACE THE ABILITY OF LOCAL GOVERNMENTS TO STRUCTURE PUBLIC TRANSPORTATION LABOR RELATIONS

The success or failure of municipalities in discharging their obligation to provide integral public transit services depends in large part upon their ability to make fundamental employment decisions concerning wages, hours, overtime pay, vacation schedules, and the like, through local collective bargaining free from federal interference. Constant federal judicial scrutiny of such basic local governmental decisions would "significantly alter or displace the States' abilities [through their municipalities] to structure employer-employee relationships [in the transit labor area]." *National League of Cities* v. *Usery, supra,* at 851.

Recognizing the importance of local government decisionmaking to the successful provision of traditional government functions, the Congress wisely chose to exempt all municipal labor relations from such federal scrutiny and interference in the National Labor Relations Act (NLRA), 29 U.S.C. §152(2). That Act, which governs almost all private labor-management relations, excludes from its coverage the employees of "any state or political subdivision thereof." *Id.* No municipal employee may invoke federal jurisdiction to obtain judicial scrutiny of local collective bargaining arrangements or of their alleged breach. By enacting Section 13(c) of UMTA, the Congress did not

intend to alter that general rule, or to create any "*national* labor policy" concerning the relationship between municipalities and their transit employees.[20]

The legislative history of Section 13(c) of UMTA suggests that the Congress fully intended to leave undisturbed the ability of local governments freely to structure their labor relations with transit employees. Repeatedly during Congressional debates and hearings on UMTA, the proponents of the Act announced that "there could be no superseding of the State laws by a provision [like Section 13(c)];"[21] that Section 13(c) was drafted in its present form "in order to make clear that Taft-Hartley exemptions [from the NLRA] are not changed" by the Act;[22] and that Section 13(c) "deals with municipal and State problems, not Federal problems."[23]

Nowhere did Congress evince any intention to abrogate the otherwise plenary authority of municipalities to fashion their public employee labor relations by creating a federal common law of transit labor relations whose contours can be discerned and defined only by federal judicial incantation. Instead, the Congress expressed its desire to leave "specific conditions for worker protection" to "the product of local bargaining and negotiation,"[24] and not to the federal courts.

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[20]*Local Div. 589, ATU* v. *Massachusetts,* Nos. 81-1180, and 81-1219, (1st Cir., Sept. 30, 1981), Slip op. at 34-35, 37-40, *aff'g* 511 F.Supp. 312 (D. Mass. 1981).

[21]*See e.g.* Hearings on S.6 before the Senate Committee on Banking and Currency, 88th Cong., 1st Sess., at 312 (1963) (remarks of then Secretary of Labor Wirtz).

[22]*See e.g.* 109 Cong. Rec. 5674 (1963) (remarks of Senator Morse).

[23]*Id.*

[24]H.R. Rep. No. 88-204, 88th Cong., 2d Sess., reprinted in [1964] U.S. Code Cong. & Ad. News, 2584-85.

Absent any clear expression of Congressional intent to repeal the exemption of municipal transit workers from the coverage of federal labor law, or any expression of its desire to alter or displace the ability of municipalities to structure their transit labor relations free from federal interference, NIMLO submits that the federal courts should decline to intervene in local public transit labor disputes by assuming jurisdiction of actions which allege violations of Section 13(c) of UMTA. Similarly, NIMLO suggests, the federal courts should not imply from Congressional silence that, simply by supplying funds for local transit operating and capital expenditures, the Congress intended federal courts to fashion a judicial remedy for every alleged grievance which may arise from local transit labor disputes.

The holding of the Court of Appeals in this case, that Section 13(c) of UMTA created a "*national* labor policy", is simply wrong. That holding makes more likely the persistence of transit contract disputes between public employers and their transit employees, who may seek refuge from unfavorable local decisions in the federal courts. The decision of the Court of Appeals in this case, NIMLO submits, should be reversed.

CONCLUSION

For the foregoing reasons, the National Institute of Municipal Law Officers, as *amicus curiae,* respectfully submits that the decision rendered by the United States Court of Appeals for the Sixth Circuit in this case should be reversed.

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Respondent's Reply Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE,

Petitioners,

v.

LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND IN RESPONSE TO BRIEF OF AMICUS CURIAE, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

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TABLE OF CONTENTS

	PAGE
I. ARGUMENT	1
A. The Dispute Here Does Not Involve The Issues Raised By Amicus	1
B. Congress Intends Its Laws To Be Enforced	4
C. The *National League of Cities* Doctrine Has No Applicability Here	7
II. CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	PAGE
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975)	3
California Dep't. of Human Resources v. *Java*, 402 U.S. 121 (1971)	9
Cannon v. *Univ. of Chicago*, —— U.S. ——, 99 S. Ct. 1946 (1979)	3
J. I. Case v. *Borak*, 377 U.S. 426 (1964)	3
City of Macon v. *Marshall*, 439 F. Supp. 1209 (M.D. Ga. 1977)	8, 9
Cort v. *Ash*, 422 U.S. 66 (1975)	3
County of Los Angeles v. *Adams*, 574 F. 2d 607 (D.C. Cir. 1978) (per curiam)	8
County of Los Angeles v. *Marshall*, 631 F. 2d 767 (D.C. Cir. 1980)	8
Division 519, Amalgamated Transit Union v. *LaCrosse*, 445 F. Supp. 798 (W.D. Wis. 1977) (preliminary injunction issued); *affirmed*, 585 F. 2d 1340 (7th Cir. 1978)	6
Division 589, Amalgamated Transit Union v. *Commonwealth of Massachusetts, etc.*, Nos. 81-1180, 1198 & 1219 (1st Cir. Sept. 30, 1981) *modified on rehearing, en banc*, Oct. 23, 1981	1, 3, 4

CASES: PAGE

Division 714, Amalgamated Transit Union v. *Greater Portland*, 589 F. 2d 1 (1978) 3, 4

Florida Dep't of Health & Rehabilitative Servs. v. *Califano*, 449 F. Supp. 274 (N.D. Fla.), *aff'd mem.*, 585 F. 2d 150 (5th Cir. 1978), *cert. denied*, 441 U.S. 931 (1979) 8

Hodel v. *Virginia Surface Mining*, —— U.S. ——, 101 S. Ct. 2352 (1981) 9

King v. *Smith*, 392 U.S. 309 (1968) 9

National League of Cities v. *Usery*, 426 U.S. 833 (1976) 7, 8, 9

North Carolina ex rel. Morrow v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (three judge court) *aff'd mem.*, 435 U.S. 962 (1978) 8

Pennhurst State School v. *Halderman*, —— U.S. ——, 101 S. Ct. 1531 (1981) 9

State of New Hampshire v. *Marshall*, 616 F. 2d 767 (D.C. Cir. 1980), *appeal dismissed* —— U.S. ——, 101 S. Ct. 53 8

State of Oklahoma v. *Schweiker*, —— F. 2d ——, No. 80-1004 (D.C. Cir. June 18, 1981) 8

Texas Landowners Rights Ass'n v. *Harris*, 453 F. Supp. 1025 (D.D.C. 1978), *aff'd mem.*, 598 F. 2d 311 (D.C. Cir.), *cert. denied*, 444 U.S. 927 (1979) 8

Transamerica Mortgage Advisors, Inc. v. *Lewis*, —— U.S. ——, 100 S. Ct. 242 (1979) 7

OTHER AUTHORITIES

Securities Exchange Act of 1934
15 U.S.C. § 78 *et seq.* 2

Urban Mass Transportation Act
49 U.S.C. § 1609(c) .....passim

109 Cong. Rec. 5670-75 (1963) .....passim

Respondent, Local Division 1285, Amalgamated Transit Union, pursuant to Rule 22.6 of the Supreme Court Rules, hereby supplements its Brief in Opposition to Petition for Writ of Certiorari to respond to the contentions raised by amicus curiae National Institute of Municipal Law Officers (hereinafter, "NIMLO"), in its brief filed on November 2, 1981 (hereinafter, "NIMLO Brief").

I.

ARGUMENT

A. The Dispute Here Does Not Involve The Issues Raised By Amicus.

In its brief, amicus NIMLO repeats the same error as Petitioners and amicus American Public Transit Association (hereinafter, "APTA"). All three parties would have this Court review here the federal/state supremacy issues in question in *Division 589, Amalgamated Transit Union* v. *Commonwealth of Massachusetts, etc.*, Nos. 81-1180, 1198 and 1219 (1st Cir. Sept. 30, 1981), *modified on rehearing en banc,* Oct. 23, 1981 (hereinafter, "*Boston*"), but as demonstrated herein, not at issue here.[1]

As set forth in Respondent's Supplemental Brief in Response to Petitioners' Supplemental Brief (hereinafter, "Resp. Supp. Br."), *Boston* addresses only the question of whether a state may legislate the nullification of its federally mandated commitments. Respondent reiterates that the judgment for which *certiorari* is sought here reversed only the District Court's dismissal for lack of jurisdiction and failure to state a claim. The District Court ruling at issue did not resolve any question on the merits. The question of whether § 13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 1609(c) (hereinafter, "§ 13(c) of the UMTA"), the federal law at issue here, contemplates its own nullification by later enacted state legislation has

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1. Petitioners' own erroneous application of *Boston* is set forth in their Supplemental Brief, filed on November 2, 1981, to which Respondent has replied in a separate supplemental brief. Respondent also has replied in a separate supplemental brief to the specific arguments made in APTA's proposed amicus brief..

not been presented or argued in *Jackson;* indeed, the existing record indicates that no such problem even exists in Tennessee. (Petitioners' Petition, Appendix, pp. 28a-29a (hereinafter, "Pet. App.").

Both amici and now Petitioners in their Supplemental Brief erroneously attempt to transform *Boston,* which holds that the Massachusetts Defendants may nullify their long-standing federal commitments by enacting a directly conflicting state law, into a holding that these federal statutory commitments may not be enforced under any circumstances. Thus, amicus NIMLO totally avoids the critical question at issue in *Jackson* by asserting:

> The legislative history of Section 13(c) of UMTA suggests that the Congress fully intended to leave undisturbed the ability of local governments freely to structure their labor relations with transit employees. Repeatedly during Congressional debates and hearings on UMTA, the proponents of the Act announced that "there could be no superseding of the State laws by a provision [like Section 13(c)];" (NIMLO Brief, p. 13).

At this point in the litigation, the *Jackson* Court has held only that federal statutory commitments, standing alone, and not met with later-enacted conflicting state law, may be enforced. Recognizing a private right of action to enforce a federal obligation is not equal to finding that the federal law supersedes state law, as NIMLO asserts; alternatively, the inability to preempt state law would not preclude a finding that, absent such state law, a federal obligation may be enforced. Accordingly, this Court has not ruled that a finding of federal preemption of state law is a prerequisite to the implication of private enforcement of federal law.[2]

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2. To cite just a few examples, the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78, *et seq.,* does not preclude the states from enacting their own securities laws, such as the numerous

(Footnote continued on next page)

Nor, as the examples in note 2 illustrate, does the inability to preclude state legislation mean that the subject matter is traditionally a local concern under *Cort* v. *Ash*, 422 U.S. 66 (1975). Securities exchange is certainly not a traditional local concern; civil rights is almost a paradigm of federal concern. The federal/state concerns at issue here were best expressed by the Court of Appeals for the First Circuit in *Division 714, Amalgamated Transit Union* v. *Greater Portland*, 589 F. 2d 1, 15, 16 (1978), recently reaffirmed in *Boston. Boston, supra,* rehearing *en banc* opinion. (Resp. App., p. F5). In *Portland,* the United States Court of Appeals for the First Circuit held that:

> Section 13(c) agreements, however, differ from usual collective agreements entered into by state and local agencies in that *their terms are regulated by federal law. The UMTA requires that § 13(c) agreement be made, and places important requirements on their content.* Usual collective bargaining agreements covering state employees are subject only to state regulation. *See* 29 U.S.C.§ 152(2); *cf. National League of Cities* v. *Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976) (wages and hours of state employees constitutionally excluded from federal regulation.) Therefore, the traditional allocation to state courts of enforcement of state collective agreements is not a basis for holding that enforcement of arrangements pursuant to § 13(c) should also be left to state tribunals. *Federal regulation makes enforcement of the labor protective arrangements the concern of the federal government,,* not "basically the concern of the States," rendering an implied federal remedy not inappropriate under *Cort's* fourth factor.
> *Portland, supra* at pp. 15-16 (emphasis added).

(Footnote continued from preceding page)
state Blue Sky Laws; nevertheless, the Act has been construed as privately enforceable for years. *See, Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 730 (1975); *J. I. Case* v. *Borak,* 377 U.S. 426, 430 (1964). Similarly, the federal civil rights laws do not preempt the states from enacting state civil rights laws; yet the federal civil rights laws are impliedly privately enforceable. *Cannon* v. *Univ. of Chicago,* —— U.S. ——, 99 S. Ct. 1946 (1979).

Thus, the First Circuit's reaffirmation *en banc* of *Portland*, wherein the Court held that § 13(c) and the agreements executed thereunder *are* intended to be privately enforceable in federal court, totally rebuts the contentions of amici and Petitioners that *Boston* supports their position here. Rather *Boston* is in complete accord with the ruling in *Jackson* finding both jurisdiction and a federal claim. In sum, NIMLO's entire argument regarding the alleged "displacement of local public employee law" is irrelevant to this case and adds nothing to the petition for review (NIMLO Br., pp. 12-14).

B. Congress Intends Its Laws To Be Enforced.

Petitioners and amici would have this Court rule that § 13(c) and the Agreements concluded thereunder may not be enforced at all. Amicus NIMLO characterizes this position as Congress' lack of intent to "create any national labor policy," citing *Boston*. (NIMLO Br., p. 13, n. 20). This unsupported assertion has two fatal flaws. First, the phrase "national labor policy" comes not from *Boston*, but rather from the legislative history of § 13(c). In *Jackson*, the Court of Appeals for the Sixth Circuit, citing this legislative history, opined: "It is indisputable that Section 13(c) reflects *national* labor policy. See 109 Cong. Rec. 5670." (Pet. App., p. 12a). Sure enough,at 109 Cong. Rec. 5670, Sen. Morse, the sponsor of § 13(c) has ultimately enacted into law, said:

> Paragraph 19(c) [later, § 13(c)] concerns the protective arrangement respecting interests of employees affected by the bill. As we know, any legislation which is intended to provide Federal aid for the purpose of strengthening and improving our urban area mass transportation systems must be concerned with another highly important factor, the stability of labor relations. It is a necessary corollary of any such consideration that there be provisions which would safeguard employee rights and promote and maintain the *national labor policy* with a view toward insuring labor relations stability and promoting em-

> ployee morale. 109 Cong. Rec. 5670 (1963). (emphasis added).[3]

In face of Congress' persistent characterization of § 13(c) as "national labor policy", NIMLO's assertion that "Congress did not intend to create national labor policy," is not only groundless, it is plainly wrong. Accordingly, NIMLO's entire argument, which rests solely on this assertion, is completely undermined. (NIMLO Br., pp. 12-14).[4]

The second flaw in NIMLO's distinctly unsupported position is that its reliance on the phrases like "national labor policy" is essentially meaningless. Beyond cavil, Congress, in enacting § 13(c) legislated the following federal law regarding transit labor: in order to receive UMTA money, grant recipients had to make arrangements, certified as fair and equitable by the Secretary of Labor, to protect the interests of their employees. The Congress mandated that those arrangements must include numerous and explicit substantive provisions. Unassailably, § 13(c) is federal law; it pertains to transit, and particularly to the protection of the rights of transit labor. Stripped of its rhetoric, amici's position reduces to the contention that the federal law at issue here — § 13(c) — should not be enforced at all.

NIMLO essentially concedes this unacceptable result, by suggesting that:

> Congress expressed its desire to leave "specific conditions for worker protection" to "the product of local bargaining and negotiation," and not to the federal courts. (NIMLO Br., p. 13).

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3. In just four pages of debate over § 13(c), Sen. Morse called § 13(c) the "maint[enance of] the national labor policy", *Id.;* "a matter of federal public policy" (109 Cong. Rec., at 5671), "a basic, sound national policy of economic freedom," (109 Cong. Rec., at 5672), and "federal policy" (109 Cong Rec., twice, at 5675).

4. Amicus APTA proffers the identical construct; its contention is that Congress declined to create a "federal transit labor law" (APTA Br., p. 2); NIMLO offers a variant of this, too, with "federal common law of transit" (NIMLO Br., p. 13).

In other words, the employees were to bargain for commitments, as required by the federally mandated conditions, but be barred from bringing the agreements to a court for enforcement. Various participants in this litigation have proffered this formulation over the years, but it could never surmount the cogent analysis in *Division 519* v. *LaCrosse,* 445 F. Supp. 798 (W. D. Wis. 1977); *affirmed,* 585 F. 2d 1340 (7th Cir. 1978):

> . . . *LaCrosse* . . . seems to contend that even if Congress implied that, in the circumstances alleged here, provision for interest arbitration must be embodied in the 13(c) Agreement, the damage to the purposes of the UMTA resulting from that requirement is so grievous that Congress must be held to have intended to refrain from providing the means to enforce the requirement. I doubt that the rules of statutory construction permit a court to impute to a legislative body such weakness of spirit. 445 F. Supp., at 815.

As the District Court accurately perceived, amici's rhetoric would preclude not just private enforcement of the binding federal commitments, but any enforcement of § 13(c), private or public. Even if it existed, federal public enforcement of Congress' substantive requirements under § 13(c) — continued collective bargaining, maintenance of the terms of the collective bargaining agreements, etc. — would also create decisions and actions constituting a "federal transit labor law."[5]

NIMLO's bald suggestion that this is just a case of violation of a local "collective bargaining agreement" (NIMLO Br., p. 6) belonging in state court adds nothing to the discussion. First of all, it is not true. As even a cursory perusal of the opinions below reflects, Plaintiff here, as in the numerous other § 13(c) cases (Resp. Opp. Cert., pp. 6-7, n. 5), set forth a claim that Defendants, Petitioners here, breached the federal § 13(c) commitments to con-

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5. Not surprisingly, the record in *Jackson,* below and here, is devoid of any contention by Petitioners that they should be subject to enforcement of § 13(c) by either federal Secretary.

tinued collective bargaining.[6] Second, addressing the question actually before the Court, NIMLO does not contend that the § 13(c) federal conditions could be enforced in state court. This is understandable, since, wherever enforced, the substance of the § 13(c) commitments is mandated by the federal statute. As several courts have ruled, it would indeed be "anomalous" for federal substantive rights to be enforceable only in *state* court. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, —— U.S. ——, 100 S. Ct. 242, 247, n. 8 (1979). Finally, as set forth above, a state court, enforcing federal substantive protections would still run afoul of NIMLO's prohibition of "national labor policy."

In sum, amicus presents this Court with no legally cognizable reason for reviewing the opinion below. Even amicus' rhetoric is directly rebutted by the very legal authority cited by it — *Boston* — as well as by UMTA's legislative history, as presented here and in Respondent's Response to APTA's amicus brief.

C. The National League of Cities Doctrine Has No Applicability Here.

Amicus NIMLO attempts to place this case under the rubric of *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (NIMLO Br., pp. 2, 12). *National League of Cities*, however, has no applicability here, where the Congressional power at issue in the UMTA was not the commerce clause, but rather the spending power.

Congress' power to enact such conditions upon federal grants has been consistently upheld. *National League of*

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6. See also, Plaintiff's Complaint, to which the Courts must look for purposes of reviewing a dismissal for want of jurisdiction or failure to state a claim. Although the opinions should suffice to rebut NIMLO's unsupported assertion, pursuant to Rule 19, Rules of the Supreme Court, Respondent has requested the Clerk of the Court of Appeals for the Sixth Circuit to certify the Complaint from the record below.

Cities explicitly excluded from its breadth Congressional enactments "under other sections of the Constitution such as the spending power, Article I, § 8, cl. 1, or § 5 of the Fourteenth Amendment." *Id.* at 852, n. 17. In its aftermath, the federal courts have consistently held that *National League of Cities* has no application to cases involving Congress' spending power, holding instead that the Tenth Amendment does not restrict the spending power.[7] Accordingly, here, where the Congressional power at issue is unquestionably the spending power, *LaCrosse, supra,* 585 F. 2d, at 1345, the Tenth Amendment has no applicability.

Amicus' contention that *National League of Cities* has relevance here was rejected explicitly in *City of Macon* v. *Marshall,* 439 F. Supp. 1209, 1216-18 (M.D. Ga. 1977), a case involving § 13(c) itself. In *Macon,* the Court upheld the authority of Congress under its spending power to condition the grant of federal monies on compliance with § 13(c). In interpreting *National League of Cities,* the Court found that the Tenth Amendment did not limit Congress' authority to place conditions on the receipt of funds under UMTA:

> While Congress cannot directly command or force a state or municipality to comply with federal wage and

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7. *State of Oklahoma* v. *Schweiker,* —— F. 2d ——, No. 80-1004, (D.C. Cir. June 18, 1981); *County of Los Angeles* v. *Marshall,* 631 F. 2d 767, 769 (D.C. Cir. 1980); *State of New Hampshire* v. *Marshall,* 616 F. 2d 240, 245 (1st Cir. 1980), *appeal dismissed,* —— U.S. ——, 101 S. Ct. 53; *County of Los Angeles* v. *Adams,* 574 F. 2d 607, 609 (D.C. Cir. 1978) (per curiam) *Texas Landowners Rights Ass'n* v. *Harris,* 453 F. Supp. 1025, 1029-30 (D.D.C. 1978), *aff'd mem.,* 598 F. 2d 311 (D.C. Cir.), *cert. denied,* 444 U.S. 927 (1979); *Florida Dep't of Health & Rehabilitive Servs.* v. *Califano,* 449 F. Supp. 274, 283-84 (N.D. Fla.), *aff'd mem.,* 585 F. 2d 150 (5th Cir. 1978), *cert. denied,* 441 U.S. 931 (1979); *North Carolina ex rel. Morrow* v. *Califano,* 445 F. Supp. 532, 536 and n. 10 (E.D.N.C. 1977) (three-judge court), *aff'd mem.,* 435 U.S. 962 (1978).

> hour concepts, *it may pursuant to the spending clause of the Constitution fix the terms and conditions upon which money from the United States Treasury will be allotted and disbursed to the States and their political subdivisions.* See *Oklahoma* v. *United States Civil Service Commission,* 330 U.S. 127, 67 S. Ct. 544, 91L. Ed. 794 (1947). 439 F. Supp., at 1218. (emphasis added)

Thus, the federal statutory conditions placed on the receipt of UMTA funds can be treated no differently from the myriad of other federal statutory schemes which contain such conditions. *Inter alia, King* v. *Smith,* 392 U.S. 309, 333, n. 34 (Aid to families of Dependent children), *California Dept. of Human Resources* v. *Java,* 402 U.S. 121, 135 (1971) (unemployment insurance law); *see, Pennhurst State School* v. *Halderman,* —— U.S. ——, 101 S.Ct. 1531, 1539, 1540, 1542, 1543 (1981).

Finally, NIMLO's own filings here unavoidably emphasize the federal nature of the relationships under UMTA, which place this case outside rubric of *National League of Cities* (NIMLO Br., pp. 7, 9, 11).[8] As recognized by NIMLO:

> . . . local governments have been forced to assume the role of owner and operator of mass transit systems as financially troubled private companies have ceased to do business. *The rise in public ownership and operation of transit systems is largely due to the availability of federal funding for the purchase of financially ailing private systems.* (NIMLO Br., p. 7; emphasis added).

That the funding for these public takeovers came almost entirely from grants under the UMTA was further acknowledged by NIMLO:

> The options available to privately owned and operated transit systems experiencing financial difficulties

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8. This Court has emphasized consistently the important role which such federal interests have in determining the applicability of the Tenth Amendment to a particular statutory scheme. *National League of Cities, supra,* 426 U.S. at 852, 853; *Id.,* at 852 (Blackmun, J. concurring); *Hodel* v. *Virginia Surface Mining,* —— U.S. ——, 101 S. Ct. 2352, 2472, n. 29 (1981).

were few: raise fares, cut services and forego capital expenditures. When these measures failed to rescue the private system, the only alternative to loss of the service was for the local government to purchase and operate the system. *Largely because financial support, in the form of federal funds, became available to public bodies for acquiring transit systems from private owners,*[10] *local governments began taking over private transit systems.*[11] At present, at least 463 municipal transit systems are publicly owned. Those systems now account for 90% of the nation's transit system operating revenues, and 91% of all transit system ridership. (NIMLO Br. 8, 9; emphasis added; footnotes omitted).

CONCLUSION

For the reasons set forth here, the arguments presented by amicus NIMLO provide no justification for this Court to grant Petitioners a writ of certiorari.

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Petitioner's Brief

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No. 81-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE,
Petitioners,

v.

LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether Congress, in enacting the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601, *et seq.*, intended to create a federal transit labor law enforceable in, and by, federal courts to govern contract disputes between public transit authorities and their employees.

2. Whether Congress, in enacting the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601, *et seq.*, intended to authorize federal courts to formulate a "federal common law" to govern contract disputes between local public transit authorities and their employees.

3. Whether an employee's, or union's, claim that a municipal transit authority breached a collective bargaining agreement executed in 1975 states a "claim arising under the laws of the United States" within the meaning of 28 U.S.C. § 1331(a) solely because the municipal transit authority received federal funds, in 1966, through a grant authorized by the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601, *et seq.*

4. Whether Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1609(c), creates a federal private cause of action for an alleged breach of a collective bargaining agreement, executed in 1975, by a municipal transit operator who received federal funds under the Act, in 1966.

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	8
ARGUMENT:	
I. Introduction	9
II. By Enacting UMTA the Congress Did Not Intend to Create a Private Federal Cause of Action for Injunctive Relief and Damages for Labor Unions Representing Municipal Transit Workers	13
A. The Urban Mass Transportation Act Does Not Reveal Any Congressional Intention to Create A Private Cause of Action	18
B. The Legislative History of the Act Does Not Support Inference of a Private Action in Favor of Transit Unions	23
C. To Imply a Private Federal Remedy Would Be Inconsistent with the Underlying Purpose of the Legislative Scheme and Would Improperly Shift to the Federal Courts a Body of Litigation Traditionally Relegated to State Law in an Area Basically the Concern of the States	35
III. By Enacting UMTA, Congress Did Not Create A New Federal Common Law of Transit Labor Relations	40
CONCLUSION	49

PAGE

TABLE OF CITATIONS

Cases

Abood v. Detroit Bd. of Education, 431 U.S. 209, 97 S. Ct. 1782 (1977) 38

Associated Businesses of Franklin v. Warren Co., etc., 522 F. Supp. 1015 (S.D. Ohio 1981) 12, 20, 35

Ass'n of Data Proc. Serv. Org., Inc. v. Camp, 397 U.S. 150, 90 S. Ct. 827 (1970) 15

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S. Ct. 923 (1964) 41

Barlow v. Collins, 397 U.S. 159, 90 S. Ct. 832 (1970) 15

Barnhart v. Brinegar, 362 F. Supp. 464 (W.D. Mo. 1973) 15

Bell v. Hood, 327 U.S. 678, 66 S. Ct. 773 (1946) 15

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999 (1971) 18

Brotherhood of Locomotive Engineers v. Chicago & Northwestern Ry. Co., 314 F.2d 424 (8th Cir. 1963) 40, 43, 46, 47

Calhoon v. Harvey, 379 U.S. 134, 85 S. Ct. 292 (1964) 17

California v. Sierra Club, __ U.S. __, 101 S. Ct. 1775 (1981) 17, 34, 35

Cannon v. Univ. of Chicago, 441 U.S. 677, 99 S. Ct. 1946 (1979) ..... *passim*

City of Atlanta v. MARTA, 506 F. Supp. 883 (N.D. Ga. 1980), aff'd 636 F.2d 1084 (5th Cir. 1981) 37

Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S. Ct. 573 (1943) 42, 43

Cohen v. MBTA (D. Mass. No. 81-791), aff'd 647 F.2d 209 (1st Cir. 1981) 37

PAGE

Congress of Ry. Unions v. Hodgson, 326 F. Supp. 68 (D.D.C. 1971) 16, 48

Cort v. Ash, 422 U.S. 66, 95 S. Ct. 2080 (1975) *passim*

Crilly v. Southeastern Pa. Transp. Auth., 529 F.2d 1355 (3d Cir. 1976) 38

Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264 (1979) 15

Dopico v. Goldschmidt, 518 F. Supp. 1161 (S.D.N.Y. 1981) 13

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938) 41

International Association of Machinists v. Central Airlines, Inc., 372 U.S. 682, 83 S. Ct. 956 (1963) 33, 40, 43, 44

Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968) 16, 41

J. I. Case Co. v. Borak, 377 U.S. 426, 84 S. Ct. 1555 (1964) 17

Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S. Ct. 2186 (1968) 18

Kissinger v. Report. Comm. for Freedom of the Press, 445 U.S. 136, 100 S. Ct. 960 (1980) 15

Local Div. 580, etc. v. Central N.Y. Regional Transit Auth., 556 F.2d 659 (2d Cir. 1977) 24

Local Division 589, Amalgamated Transit Union v. Amalgamated Transit Union, 295 F. Supp. 630 (D. Mass. 1969) 38

Local Div. 589, etc. v. Massachusetts, __ F.2d __ (1st Cir. 1981) ..... *passim*

Local Division 1212, Amalgamated Transit Union v. Chattagnooga Area Regional Transp. Auth., 483 F. Supp. 37 (E.D. Tenn. 1979) 36

Local Div. 1285, etc. v. Jackson Transit Auth., 447 F. Supp. 88 (W.D. Tenn. 1977), rev'd 650 F.2d 1379 (6th Cir. 1981) ..... *passim*

PAGE

McDonald v. Stockton Metropolitan Transit District, 36 Cal. App. 3d 437, 111 Cal. Rptr. 637 (3d Dist. 1973) 39

McFaddin Express, Inc. v. Adley Corp., 346 F.2d 424 (2d Cir. 1965), cert. den. 382 U.S. 1026 (1966) 16, 41, 49

McGlaughlin v. Penn Central Co., 384 F. Supp. 179 (S.D.N.Y. 1974) 45, 48

M.B. Guran Co., Inc. v. City of Akron, 546 F.2d 201 (6th Cir. 1976) 36

Merchants Despatch Transp. v. Systems Fed., 551 F.2d 144 (7th Cir. 1977) 15

Middlesex Co. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, ___ U.S. ___, 101 S. Ct. 2615 (1981) 18, 20, 22

Milwaukee v. Illinois and Michigan, ___ U.S. ___, 101 S. Ct. 1784 (1981) 41

Miree v. Dekalb Co., Ga., 433 U.S. 25, 97 S. Ct. 2490 (1977) 41, 42, 43

Muniz v. Hoffman, 422 U.S. 454, 95 S. Ct. 2178 (1975) 19

N.L.R.B. v. Natural Gas Utility Dist. of Hawkins Co., 402 U.S. 600, 91 S. Ct. 1746 (1971) 38

National League of Cities v. Usery, 426 U.S. 833, 96 S. Ct. 2465 (1976) 38

National R.R. Passenger Corp. v. Passengers Ass'n, 414 U.S. 453, 94 S. Ct. 690 (1974) 14, 17, 22, 48

Nemitz v. Norfolk & Western Ry. Co., 287 F. Supp. 221 (N.D. Ohio 1968); 309 F. Supp. 575 (N.D. Ohio 1969), modified 436 F.2d 841 (6th Cir.), aff'd sub nom. Norfolk & Western Ry. Co. v. Nemitz, 404 U.S. 37, 92 S. Ct. 185 (1971) 40, 44, 45

PAGE

Northwest Airlines v. Transport Workers Union, ___ U.S. ___, 101 S. Ct. 1571 (1981) ..... *passim*

Osborn v. American Ass'n of Retired Persons, 660 F.2d 740 (9th Cir. 1981) 18, 34

Pan American Petro. Corp. v. Sup. Ct. of Del., 366 U.S. 656, 81 S. Ct. 1303 (1961) 41

People's Housing Dev. Corp. v. Poughkeepsie, 425 F. Supp. 482 (S.D.N.Y. 1976) 20

Pennhurst State School & Hosp. v. Halderman, ___ U.S. ___, 101 S. Ct. 1531 (1981) 11, 19, 34

Philbrook v. Glodgett, 421 U.S. 707, 95 S. Ct. 1893 (1975) 19

Phillips Petro. Co. v. Texaco, Inc., 415 U.S. 125, 94 S. Ct. 1002 (1974) 41

Prescription Plan Serv. Corp. v. Franco, 552 F.2d 493 (2nd Cir. 1977) 16

Rivers v. Rosenthal Co., 634 F.2d 774, (5th Cir. 1980) 22

Rogers v. Frito-Lay, 611 F.2d 1074 (5th Cir. 1980) 22

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S. Ct. 1670 (1978) 23

Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 95 S. Ct. 1733 (1975) 17

Sullivan v. Little Hunting Park, 396 U.S. 229, 90 S. Ct. 400 (1969) 19

Sumner v. Mata, 449 U.S. 539, 101 S. Ct. 764 (1981) 37

T.B. Harms Co. v. Eliscu, 339 F.2d 823 (2d Cir. 1964), cert. den. 381 U.S. 915 (1965) 16

Texas Industries, Inc. v. Radcliff Materials, ___ U.S. ___, 101 S. Ct. 2061 (1981) 41

Texas & Pacific R. Co. v. Rigsby, 241 U.S. 33, 36 S. Ct. 482 (1916) 17

PAGE

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 77 S. Ct. 912 (1957) 43

T.I.M.E., Inc. v. United States, 359 U.S. 464, 79 S. Ct. 904 (1959) 22

Touche Ross & Co. v. Redington, 442 U.S. 560, 99 S. Ct. 2479 (1979) ..... *passim*

Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 100 S. Ct. 242 (1979) *passim*

Tribbett v. Chi. Union Station Co., 352 F. Supp. 8 (N.D. Ill. 1972) 48

TVA v. Hill, 437 U.S. 153, 98 S. Ct. 2279 (1978) 13

United Transp. Union v. L.I.R.R., 634 F.2d 19 (2d Cir. 1980), cert. granted, ___ U.S. ___, 69 L. Ed. 2d 970 (1981) 38, 39

Universities Research Ass'n v. Coutu, 450 U.S. 754, 101 S. Ct. 1451 (1981) 17, 18, 20, 35

Wallis v. Pan American Petroleum Corporation, 384 U.S. 63, 86 S. Ct. 1301 (1966) 42

Wheeldin v. Wheeler, 373 U.S. 647, 83 S. Ct. 1441 (1963) 16, 17, 41

Federal Statutes

National Housing Act
12 U.S.C.
§ 1749a 21

Education Amendments of 1972
20 U.S.C.
§ 1681 20

Judicial Code
28 U.S.C.
§ 1254 2
§ 1331 ..... 3, 6, 7, 11, 16, 44

PAGE

§ 1336 ..... 45, 46, 48
§ 1337 ..... 6, 11, 16, 44
§ 1361 11

Labor Management Relations Act
29 U.S.C.

§ 141 et seq. 38
§ 152 37
§ 185 ..... 36, 43

Civil Rights Act of 1964
42 U.S.C.

§§ 2000 et seq. 19

Railway Labor Act
45 U.S.C.

§ 153 48
§ 156 46
§ 184 ..... 40, 43

Railway Passenger Service Act of 1970
45 U.S.C.

§ 501 et seq. 47
§ 547 ..... 47, 48
§ 561 47
§ 564 48
§ 565 47
§ 542 48

Interstate Commerce Act
49 U.S.C.

§ 5 ..... 40, 44, 45, 46, 47
§ 9 ..... 45, 48
§ 16 ..... 45, 46, 48

PAGE

Urban Mass Transportation Act of 1964
49 U.S.C.
§ 1601 ..... 12, 19,35
§ 1602 ..... 2, 4, 12, 19, 21
§ 1604 ..... 4, 12, 13, 20. 21
§ 1606 ..... 4, 13, 20, 21

Urban Mass Transportation Act of 1964
49 U.S.C.
§ 1607 ..... 4, 13, 20
§ 1608 ..... 13, 19, 20, 21
§ 1609 ..... *passim*
§ 1610 ..... 13, 20
§ 1611 ..... 13, 20, 21
§ 1612 ..... 12, 13, 20
§ 1613 12
§ 1614 5,12
§ 1615 ..... 13, 19, 20 21, 48
§ 1618 12

Airport and Airway Development Act of 1970
49 U.S.C.
§ 1701 et seq. 41

State Statutes

Conn. Gen. Stat. § 7-273(i) 38
Del. Code Ann., Title 19, § 802 38
Ill. Rev. Stat., Ch. 111 ⅔, §§ 702.15 & 702.16(a) 38
Ind. Code Ann. § 19-5-2-23 38

PAGE

Ky. Rev. Stat. § 96A.200 38
Md. Code Ann., Transp. Art., § 7-601 et. seq. 38
N.Y. Civ. Serv. Law § 209 38
Or. Rev. Stat. § 267.235 38
Tenn. Code Ann. § 6-3802 ..... 4, 38
Utah Code Ann. § 11-20-30 38
Va. Code § 15.1-1357.2 38
Wisc. Stat. § 111.70 38

Legislative History

[1964] U.S. Code Cong. & Ad. News, 2569 et seq. *passim*
Hearings on S.6 and S.917 before the Subcommittee on Housing of the Senate Banking & Currency Committee, 88th Cong., 1st Sess. (1963) ..... *passim*
Hearings on H.R. 3881 before the House Banking and Currency Committee 25, 31, 32
109 Cong. Rec.
3622-23 (daily ed., March 8, 1963) 26, 27
5018-20 (daily ed., April 1, 1964) 23
5345-59 (daily ed., April 4, 1964) ..... *passim*
5415-21 (daily ed., April 4, 1964) 31, 32
110 Cong. Rec.
15453-54 (daily ed., June 30, 1964) 23
S. 807, 88th Cong., 1st Sess. (1963) 26

Treatises

1 Moore's Federal Practice ¶ 0.62 [2.-2] 14, 15
13 C. Wright, Federal Practice and Procedure
§ 3522 14
§ 3562 15

No. 81-411

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' BRIEF

Jackson Transit Authority and the City of Jackson, Tennessee, defendants in the suit below, respectfully pray that the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 3, 1981 be reversed.

OPINIONS BELOW

On June 3, 1981, after consideration by a three-judge panel, the Sixth Circuit issued an opinion and judgment reversing and remanding the District Court's judgment, which had dismissed the claim of the Respondent Union for lack of federal subject matter jurisdiction. The majority and dissenting opinions of the Sixth Circuit are reported at 650 F.2d 1379 (1981), and are reproduced at pages 1a through 19a of the Appendix to the Petition for Certiorari in this case. The opinion of the United States District Court for the Western District of Tennessee, Eastern Division, (Wellford, J.) dated December 23, 1977, is reported at 447 F. Supp. 88 (1977) and is reproduced at pages 20a through 30a of the Petition Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit reversing and remanding the District Court's judgment was decided and entered on June 3, 1981. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1609(c):

> (c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to

employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

28 U.S.C. § 1331(a):

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

Jackson, Tennessee is a small municipality in the western portion of Tennessee, located approximately midway between Memphis and Nashville. Jackson City Lines, Inc., a private bus company, rendered transit service until April 1966 when it decided that it could no longer render service. In order to continue the existing bus service, the City of Jackson, pursuant to the statutory authorization of the Tennessee Code, created the Jackson Transit Authority[1] as a public function.

Jackson was specifically granted the power and authority to ". . . bargain collectively with labor organizations representing employees and may enter into agreements with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of such employees." Tenn. Code Ann.

[1] For convenience, the Petitioners will be referred to as "Jackson" and the Respondent Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC, will be referred to as "Union." Also parties to this matter in the District Court and in the Court of Appeals were the Secretary of Transportation, then William T. Coleman, Jr., and then Secretary of Labor William J. Usery.

§ 6-3802 (Supp. 1976). In addition, Jackson was authorized to enter into "fair and equitable arrangements" for protection of employees of existing transportation systems, including continuation of collective bargaining rights.

In order to facilitate the transit services to be provided by Jackson, it filed a capital grant application under the Urban Mass Transportation Act ("UMTA") to assist in the purchase of twelve new buses and construction of a bus maintenance facility to replace those of the former private operation.

UMTA delineates numerous conditions of grant approval, a number of which require that certain groups or interests, such as private transportation companies, charter and school bus operations, and elderly, handicapped or displaced persons be afforded a measure of protection by the grant recipient. See, e.g., §§ 1602(a)(2)(A), 1602(a)(3), 1602(e), 1602(f), 1602(g), 1604(l), 1604(m), 1606, 1607, 1609(c).[2] One of the many conditions of grant approval is Section 13(c) of the Act, 49 U.S.C. § 1609(c) which requires that "fair and equitable arrangements [be] made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance." Although the statute does not require a negotiated agreement, these arrangements generally take the form of a "13(c) agreement" between the local public transit agency and the local union.

In order to qualify for a grant, Jackson entered into a "Section 13(c) Agreement" with the Union, which had been the collective bargaining agent for the transit employees since 1943.[3] That agreement was submitted to

[2] For none of these interests did Congress even allude to the existence of federal subject matter jurisdiction or a private right of action to enforce any purported federal right under the Act. To sustain such an implication under Section 13(c) may well require a similar implication of jurisdiction and a private federal remedy for each of these special interests, all in the face of Congress' virtually tangible silence on the issue.

[3] At the time the complaint was filed, Jackson employed 21 persons of whom 18 were represented by the Union.

the Secretary of Labor, who certified that it met the "fair and equitable" standard of § 13(c). In accordance with § 13(c)(5), the substance of the agreement was incorporated in the grant contract between Jackson and the United States and, pursuant to the grant contract, Jackson was granted $279,000.

At the time this complaint was filed, Jackson had received no other UMTA grants, since 1966.[4]

Also in 1966, Jackson entered into a management contract with T. O. Petty, an individual, to manage Jackson's transit system. Between 1966 and 1975, Petty and the Union negotiated three collective bargaining agreements, each of three years duration. There is no allegation that any of these agreements were breached. In 1975, a fourth collective bargaining agreement was executed by Petty and the Union to cover the period between April 1, 1975 and April 1, 1978. Shortly after execution of the 1975 agreement, Petty resigned as manager and the management contract terminated.

In December 1975, acting upon the advice of its attorney, Jackson notified the Union that the most recently negotiated agreement was not valid, subsisting and binding.[5] Jackson requested the Union to "sit down and discuss" the matter with them and until such time the

[4] Subsequent to the adoption of the Federal Public Transportation Act of 1978 (P.L. 95-599), Jackson has been eligible to receive, and has received, certain subsidies, made available to states to "pass through" to certain "non-urbanized" transit systems by reason of the Act. *See* 49 U.S.C. § 1614.

[5] The City Attorney concluded that Jackson does not "have any contractual relationship with the Union" indicating (1) that the April 1975 agreement between Petty and the Union was personal to Petty and since he had resigned as Manager, the agreement did not bind Jackson, and (2) that the April 1975 agreement was *ultra vires* because it created an obligation in excess of $5,000 without the express approval of the Board of Commissioners, *i.e.*, that it had not been properly ratified pursuant to the requirements of the city ordinance creating the Authority.

"cost of living escalator" would not be honored and wages currently in effect would be "frozen." Jackson sought a satisfactory meeting date.[6]

Instead of meeting with Jackson, the Union, through its International President, sought a "determination" from the Secretaries of Labor and Transportation that Jackson "in attempting to nullify the collective bargaining agreement and in thereafter breaching its provisions, had violated the Section 13(c) Agreement." The Secretaries of Labor and Transportation refused to do so.

Shortly thereafter, the Union filed this action in the United States District Court for the Western District of Tennessee.[7] The Union sought injunctive and monetary relief against Jackson and relief in the nature of mandamus against the Secretaries of Labor and Transportation. The Complaint alleged the breach of the collective bargaining agreement; it did not allege that Jackson had violated any provision of UMTA and it did not raise any issue of the construction or interpretation of UMTA.

Jackson and the United States each filed Motions to Dismiss the Union's Complaint for want of subject matter jurisdiction. The District Court granted both motions to dismiss because Judge Wellford concluded that:

> [T]his Court is convinced that plaintiff's right of collective bargaining will not be lost if this matter is left for state law on the basis of a breach of contract or arbitration claim. . . . The contract which is sought to be enforced sets out private rights which may be enforced, if necessary, in state court. The rights of

[6] In addition to reciting the lack of a contractual relationship, Jackson forwarded to the Union a recently completed city audit which disclosed the substantial deficits that the bus operation had incurred.

[7] The Union asserted that the court possessed jurisdiction of the action against Jackson by virtue of 28 U.S.C. § 1331(a), by 28 U.S.C. § 1337 (a statute regulating interstate commerce), by UMTA, 49 U.S.C. § § 1601 *et seq.*, and by "pendent jurisdiction . . . with respect to a cause of action arising from breach of contract."

> plaintiff were preserved in the contract which was approved by federal authorities as a part of a grant application procedure. This Court is not inclined to find that federal law has pre-empted state remedies as claimed by plaintiff. . . .
>
> In summary, plaintiff seeks to enforce, or an interpretation of, asserted contractual rights in this cause. The suit is not basically concerned with the validity or construction of a federal statute or the action taken by an administrative officer or agency under provisions of the federal statute. (Petition Apx. at 29a-30a).

The Sixth Circuit affirmed the District Court's holding as to the Federal Defendants[8] but, in a divided opinion, reversed the District Court's holding as to Jackson. The court found subject matter jurisdiction under 28 U.S.C. § 1331(a), adopting the Union's contention that their action to enforce an "existing" local collective bargaining contract "arose" from a right guaranteed to transit employees by § 13(c) of UMTA. (Pet. Apx. at 4a-14a). Because the Sixth Circuit found that the right asserted derived from a federal statute, the court concluded that the Union's claim arose under the laws of the United States. (Pet. Apx. at 4a-8a).

Furthermore, the Sixth Circuit found, using the test set out in *Cort v. Ash*, 422 U.S. 66 (1975), that it was proper to imply a private federal remedy under § 13(c) for breach of a collective bargaining agreement by public transit authorities, *i.e.*, that "Section 13(c) reflects *national* labor policy" (Pet. Apx. at 12a) (emphasis in the original) enforceable in federal court. Although the court noted the "recent tendency on the part of the Supreme Court to limit the inference of private actions from federal statutes," (Pet. Apx. at 13a), the court opted not to give effect to the directives of these cases.

[8] The Court of Appeals held that the Secretary of Labor and the Secretary of Transportation had been given no enforcement authority by § 13(c). (Pet. Apx. at 14a-17a).

Jackson petitioned for a writ of certiorari on August 31, 1981, which petition was granted on November 30, 1981. No cross-petition was filed by the Union.

SUMMARY OF ARGUMENT

1. The Urban Mass Transportation Act of 1964 (UMTA), 49 U.S.C. § 1601 *et seq.*, is a typical federal funding statute. It authorizes federal financial assistance to state and local public bodies to aid them in developing urban mass transit facilities. To qualify for federal assistance, grant applicants are required to meet numerous and complex statutory conditions, only one of which is the requirement that "fair and equitable arrangements" be made "to protect the interests of employees affected by such assistance." 49 U.S.C. § 1609(c). The Act contains no provision which expressly creates a private cause of action for violation of its terms.

2. By enacting UMTA, the Congress did not intend to create a private federal cause of action for injunctive relief and damages for transit labor unions. The language, structure, and legislative history of the Act reveal that UMTA is a statute enacted for the public benefit, whose beneficiaries are the potential users of public transportation, rather than one whose "unmistakeable focus" is on transit workers and their unions.

3. The legislative history of UMTA Section 13(c) reveals no discussion about the means by which the conditions of federal assistance might be enforced. To infer a private federal cause of action under such circumstances would be "a hazardous enterprise, at best." The legislative history shows that the protection of transit workers was only a secondary concern. The Congress did not mean to create any new federal rights in favor of labor unions and their members. The Congress clearly expressed its understanding that Section 13(c) arrangements were to have only "transitional effect" and not to "establish protections for the future". The "federal responsibility" and "interest terminates" once an UMTA grant is made. Congress made clear that the exemption of municipalities from the

National Labor Relations Act would not be changed by Section 13(c), and that Section 13(c) would not preempt or supersede any state or local law. It did not intend to create any federal rights, or to authorize the inference of any private federal cause of action.

4. To infer a private federal cause of action would be inconsistent with the underlying purpose of the legislative scheme enacted in UMTA, and with Congress' understanding that the "fair and equitable arrangements" contemplated by Section 13(c) "normally will be the product of local bargaining and negotiation." Furthermore, to infer such a cause of action would improperly shift to the federal courts a body of litigation traditionally relegated to state law in an area basically the concern of the states, without any federal decisional guidelines provided by the statute.

5. Finally, by enacting UMTA, Congress did not authorize the creation of new federal common law to govern the labor relations of municipalities and transit workers. A Section 13(c) agreement, and a local collective bargaining agreement, is not one which requires national uniformity of decision. Nor did the Congress expressly grant the federal courts the power to develop substantive law, by enacting UMTA. Hence, it is clear that Congress did not mean all aspects of the performance or interpretation of Section 13(c) agreements and local transit labor agreements to be governed by law fashioned by the federal, rather than state, courts. In sum, this case was properly dismissed by the District Court, and the opinion and judgment of the Sixth Circuit should be reversed.

ARGUMENT

I.

INTRODUCTION

The central question presented in this case is whether Congress, by enacting the Urban Mass Transportation Act of 1964 (UMTA), intended to create an implied private federal cause of action for monetary damages and injunc-

tive relief for the alleged breach of a collective bargaining agreement between a municipal transit system and its employees' union representatives. Also presented is the question whether, by enacting UMTA, the Congress meant to displace state and local law governing municipal labor relations, and to permit the lower federal courts to fashion new federal common law to control relations between municipalities and their transit employees.

The one count Complaint filed by the Union in the United States District Court for the Western District of Tennessee, alleged that Jackson had breached the terms of a collective bargaining agreement concluded on June 17, 1975 by one T. O. Petty, the former manager of the Jackson transit system, and the Union. The Complaint asserted that, "by unilaterally declaring" the collective bargaining agreement "to be null and void", Jackson also had breached the terms of an agreement, executed by the Union and Jackson on July 26, 1966, which provided certain fair and equitable arrangements for the protection of Jackson City Lines, Inc. employees who might be adversely affected by Jackson's 1966 takeover of that failing private transit system. (Complaint ¶ 13). The Union's Complaint averred that the 1966 agreement, commonly referred to as the Section 13(c) agreement, had been certified by the Secretary of Labor under the provisions of UMTA Section 13(c), 49 U.S.C. § 1609(c), in order to obtain $279,000 in federal funding to facilitate the public takeover of Jackson's transit system. (Complaint ¶ 9). It claimed that, by concluding the Section 13(c) agreement, Jackson "agreed to be bound" by the 1966 collective bargaining agreement between Petty and the Union and to continue to bargain collectively with the Union. (Complaint ¶ 10). By allegedly breaching the terms of the 1975 collective bargaining agreement between Petty and the Union,[9] the Complaint averred that the 1966

[9] The Complaint alleged that in addition to "declaring" the 1975 collective bargaining agreement "to be null and void," Jackson took certain other unilateral actions, by withholding cost of living pay adjustments and by changing funeral and sick leave provided in the 1975 collective bargaining agreement

Section 13(c) agreement had been violated, purportedly causing the Union and its members to suffer "irreparable and increasing damages by the denial of certain wage . . . and other rights and benefits guaranteed by the collective bargaining agreement." (Complaint ¶ 24). The Complaint asked for damages and injunctive relief, to require Jackson to comply with the agreement between Petty and the Union. Jurisdiction of the subject matter of the Complaint was allegedly "based on 28 U.S.C.A. §§ 1331(a), 1337 and 1361 and the Urban Mass Transportation Act of 1964, 49 U.S.C.A. § 1601 *et seq.* (as amended 1968) . . ." (Complaint ¶ 1).[10]

The Urban Mass Transportation Act of 1964, is a typical federal funding statute.[11] The explicit purpose of the Act is

(Complaint 14, 16), by "demanding" that the Union "enter into new collective bargaining sessions" (Complaint ¶ 15), by suspending Union dues check off (Complaint ¶ 17), and by "initiating actions to reorganize the operations of JTA" (Complaint ¶ 18). It alleged that each of these actions breached both the 1975 collective bargaining agreement and the 1966 Section 13(c) agreement.

[10] The Complaint also alleged that the Secretaries of Labor and Transportation had not taken "steps necessary to ensure [Jackson's] compliance with [the Section 13(c)] agreement," and had thus failed to exercise their statutory "duty". (Complaint ¶20-23). Invoking the provisions of UMTA and 28 U.S.C. § 1361, the Union requested that the court order the Secretary of Labor to find that Jackson had breached the 1966 Section 13(c) agreement, and order both the Secretaries of Labor and Transportation "to take appropriate action to enforce compliance with the § 13(c) agreement . . ." Both the District Court, *Local Div. 1285, etc. v. Jackson Transit Authority*, 447 F. Supp. 88, 90-92 (W.D. Tenn. 1977), and the Sixth Circuit, *Local Div. 1285, etc. v. Jackson Transit Authority*, 650 F.2d 1379, 1387-88 (1981), agreed that the Union had failed to state any cause of action against the Secretaries upon which the federal courts could grant relief. No cross-petition for certiorari was filed by the Union in this Court to review the judgments of the lower courts that UMTA Section 13(c) provided no cause of action for the Union against the Secretaries of Labor and Transportation. The Union apparently abandoned its reliance on 28 U.S.C. § 1337 in the Sixth Circuit.

[11] *See Pennhurst State School & Hosp. v. Halderman*, ___ U.S. ___, 101 S. Ct. 1531, 1540, 1542 (1981).

to "assist" State and local governments "in the development of improved mass transportation facilities"; to "encourage" those governments to plan and establish "areawide urban mass transportation systems needed for economical and desirable urban development"; and "to provide assistance" to those governments through the use of federal grants "in financing such systems, to be operated by public or private mass transportation companies *as determined by local needs.*" 49 U.S.C. § 1601(b) (emphasis added). *See Associated Businesses of Franklin v. Warren Co., etc.*, 522 F. Supp. 1015, 1017 (S.D. Ohio 1981).

UMTA was enacted by Congress to treat dissatisfication with the "movement of people and goods within [urban] areas" resulting from "deterioration or inadequate provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning . . ." 49 U.S.C. § 1601(a)(2). Congress found that "the maintenance of even minimal mass transportation service . . . has become so financially burdensome as to threaten [its] continuation" and that "the termination of such service or the continued increase in its cost to the user is undesirable, and may have a particularly serious adverse effect upon the welfare of a substantial number of lower income persons". 49 U.S.C. § 1601b(4,5). As a result, Congress saw fit to authorize the Secretary of Transportation "to make grants or loans . . . to assist States and local public bodies and agencies thereof in financing, (1) the acquisition, construction, reconstruction, and improvement of facilities and equipment for use, by operation or lease or otherwise, in mass transportation service in urban areas . . . and (2) the establishment and organization of public or quasi-public transit corridor development corporations or entities." 49 U.S.C. § 1602(a)(1).[12]

[12] Federal funding is now available, under a variety of circumstances, to both State and local public bodies and agencies, both urban and rural, for both capital projects and operating assistance. *See* 49 U.S.C. §§ 1602, 1604, 1612(b), 1613, 1614 and 1618.

To qualify for such federal financial assistance, state and local governments must meet a host of complex and interrelated statutory and regulatory conditions. *Dopico v. Goldschmidt*, 518 F. Supp. 1161, 1173 (S.D.N.Y. 1981). For example, such grant or loan applicants are required to develop long range urban transporation plans, 49 U.S.C. §§ 1604(g), 1607; to conduct public hearings concerning the economic and social effects and environmental impact of transportation projects, 49 U.S.C. § 1604(h,i); to establish relocation programs to assist families displaced by such projects, 49 U.S.C. § 1606; to comply with record keeping requirements, 49 U.S.C. § 1608, 1611; to make environmental impact statements, 49 U.S.C. § 1610; to make special efforts on behalf of handicapped and elderly citizens, 49 U.S.C. § 1612; and to refrain from discrimination on the grounds of race color, creed, national origin, sex or age, 49 U.S.C. § 1615. Only one among the many statutory conditions of federal financial assistance is the requirement that "fair and equitable arrangements" be made "to protect the interests of employees affected by such assistance." 49 U.S.C. § 1609(c). The Act contains no section providing private parties with a cause of action to enforce any of its terms. Hence, the question raised by the Union's Complaint in this case is whether the Act implicitly provides such a remedy.

II.

BY ENACTING UMTA THE CONGRESS DID NOT INTEND TO CREATE A PRIVATE FEDERAL CAUSE OF ACTION FOR INJUNCTIVE RELIEF AND DAMAGES FOR LABOR UNIONS REPRESENTING MUNICIPAL TRANSIT WORKERS.

The inference of a private cause of action from a federal statute is an "exceptional occurrence" in the history of this Court. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 731, 99 S. Ct. 1946, 1975 (1979) (Powell, J., dissenting). The reluctance to infer such actions without any clear direction from Congress results from the respect given by the Court to the separation of powers which our Constitution envisions. *See TVA v. Hill*, 437 U.S. 153, 194-95, 98 S. Ct.

2279, 2301-02 (1978). Judicial inference of a private federal cause of action has constitutional implications:

> "Under Art. III, Congress alone has the responsibility for determining the jurisdiction of the lower federal courts. As the Legislative Branch, Congress also should determine when private parties are to be given causes of action under legislation it adopts. As countless statutes demonstrate . . . Congress recognizes that the creation of private actions is a legislative function and frequently exercises it. When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction."

Cannon v. Univ. of Chicago, 441 U.S. at 730-31, 99 S. Ct. at 1975 (Powell, J., dissenting).

The Court's restraint in enlarging the role of the federal courts beyond the boundaries plainly established by Congress results, moreover, from the "importance" which is attached by the Court "to maintaining the principles of federalism embodied in the limited grant of power to the federal courts by Article III of the Constitution." 13 *C. Wright, Federal Practice and Procedure* § 3522, at 50. Hence, the Court has been cautious to suppose that, by enacting a statute in which no private remedy is expressly granted, the Congress intended to shift private litigation from state to federal court. 1 *Moore's Federal Practice* ¶ 0.62[2.-2], at 668.

Consequently, the Court has stated that the "threshhold question" before any federal court considering its power to entertain a private suit "clearly is whether the . . . Act," under which the plaintiff purports to assert federal jurisdiction, "creates a cause of action whereby a private party . . . can enforce duties and obligations imposed by the Act." *National R.R. Passenger Corp. v. Passengers Ass'n*, 414 U.S. 453, 456, 94 S. Ct. 690, 692 (1974). The question is whether the Congress has vested the federal courts with jurisdiction to adjudicate the issues raised in a suit by a private party. *See Kissinger v. Report. Comm. for*

Freedom of the Press, 445 U.S. 136, 147, 149-50, 100 S. Ct. 960, 967, 968 (1980).[13] *See also Merchants Despatch Transp. v. Systems Fed.*, 551 F.2d 144, 148-49 (7th Cir. 1977). These questions have frequently proven difficult to answer. As Professor Wright has observed:

> "There is little difficulty if federal law provides both the substantive right and a remedy for that right. In those cases jurisdiction is taken as a matter of course. Similarly, jurisdiction will be found . . . if federal law grants the substantive right and it is held that a federal remedy fairly may be implied from that right. If the federal law provides the substantive right only,

[13] Although the Court has endeavored to define clearly the distinctions between jurisdiction, standing, causes of action, and remedies, *see Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, 2274 n.18 (1979), the concepts are interrelated, and circumscribed by Article III of the Constitution. *See Ass'n of Data Proc. Serv. Org., Inc. v. Camp*, 397 U.S. 150, 90 S. Ct. 827, (1970) and *Barlow v. Collins*, 397 U.S. 159, 90 S. Ct. 832 (1970). Unless there is a cause of action created by Congress, there is no jurisdiction in the federal courts to entertain a suit to resolve a substantive difference between private parties. Where the Congress creates no such cause of action, the federal courts only have jurisdiction to determine their own jurisdiction, *i.e.*, to determine that no such cause of action has been created.

The difference between statutory and constitutional rights must also be noted, in this regard. *See Davis v. Passman*, 99 S. Ct. at 2274 (majority), 2280 (Powell, J., dissenting). Federal courts "have a far greater" responsibility under the Constitution for the protection of those rights derived directly from it, than for the definition and enforcement of those rights created solely by Congress." *Id.* at 2280 n.1 (Powell, J., dissenting). The ordinary case is, therefore, unlike the situation presented in *Bell v. Hood*, 327 U.S. 678, 66 S. Ct. 773 (1946), relied upon by the Sixth Circuit here, *Local Div. 1285 etc. v. Jackson Transit Auth.*, 650 F.2d at 1381. *Bell* was a case in which the right to recover was based squarely on the Constitution; the more usual case is one in which "the Constituion, unaided by statute, does not create any rights against private parties," and "is one of statutory interpretation," depending for its outcome "upon whether the Congress intended to create a private cause of action." 1 *Moore's Federal Practice* ¶0.62 [2.-2], at 665-66. In short, the "*Bell* test is overbroad if viewed out of context," *Barnhart v. Brinegar*, 362 F. Supp. 464, 475 (W.D. Mo. 1973), as it was in the Sixth Circuit in this case.

> but does not give a remedy, either expressly or by implication, the remedy must come from state law and federal jurisdiction will be denied."[14]

13 *C. Wright, Federal Practice and Procedure*, § 3562, at 411-412). *See also McFaddin Express, Inc. v. Adley Corp.*, 346 F.2d 424, 426 (2d Cir. 1965); *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 489 (2d Cir. 1968); and *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 826-28 (2d Cir. 1964), *cert. denied* 381 U.S. 915 (1965).[15] In the present case federal law creates neither a right nor a remedy. Rather, the dispute between the parties involves contract rights, and the proper remedy can be found in the courts of the State of Tennessee. *See Local Div. 1285, etc. v. Jackson Transit Auth.*, 447 F. Supp. at 94.

As the Court has several times recently stated, the "central inquiry remains whether Congress intended to

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[14] *Citing, inter alia, Wheeldin v. Wheeler*, 373 U.S. 647, 83 S. Ct. 1441 (1963), and *Prescription Plan Serv. Corp. v. Franco*, 552 F.2d 493, 495-496 (2nd Cir. 1977).

[15] In *McFaddin* the court considered whether the approval of a temporary merger agreement by the Interstate Commerce Commission, not incorporated in any ICC order, was a sufficient predicate for the assumption of federal jurisdiction. The Court held that, to determine whether a civil action "arises under" federal law, the court must decide:

> ". . . whether the complaint is for a remedy expressly granted by an act of Congress or otherwise 'inferred' from federal law, or whether a properly pleaded 'state-created' claim itself presents a pivotal question of federal law, for example because an act of Congress must be construed or '"federal common law" govern[s] some disputed aspect' of the claim."

Id., 346 F.2d at 426. Finding no express or implied remedy, the *McFaddin* complaint was dismissed. Like the ICC's approval in *McFaddin*, the Secretary of Labor's "certification" of the Section 13(c) agreement here was not an "order". *Congress of Ry. Unions v. Hodgson*, 326 F. Supp. 68 (D.D.C. 1971). Moreover, it is noteworthy that, in *McFaddin* the court recognized that even if the complaint alleged a violation of an ICC order, it would still be necessary for the court to imply a federal remedy before the plaintiff might arguably meet the jurisdictional requirements of 28 U.S.C. § § 1331 or 1337. *McFaddin, supra.*

create, either expressly or by implication, a private cause of action." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S. Ct. 2479, 2489 (1979); *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 15-16, 24, 100 S. Ct. 242, 245, 249 (1979). The "ultimate question", the Court has stated, "is one of congressional intent, not one of whether the Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross*, 442 U.S. at 578, 99 S. Ct. at 2490; *Universities Research Ass'n. v. Coutu*, 450 U.S. 754, 770, 101 S. Ct. 1451 (1981); *California v. Sierra Club*, ___ U.S. ___, 101 S. Ct. 1775, 1781 (1981). The factors which are "relevant to this inquiry are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing State remedies." *Northwest Airlines v. Transport Workers Union*, ___ U.S. ___, 101 S. Ct. 1571, 1580 (1981), *citing Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 2088 (1975). *See Coutu*, 450 U.S. at 770, 101 S. Ct. at 1461; *Touche Ross*, 442 U.S. at 575-76, 99 S. Ct. at 2488-89.[16]

[16] In *Cort v. Ash*, the Court described these factors as:

"First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39, 36 S. Ct. 482, 484, 60 L. Ed. 874 (1916) (emphasis supplied) — that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? *See, e.g., National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458, 460, 94 S. Ct. 690, 693, 694, 38 L. Ed. 2d 646 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? *See, e.g., Amtrak, supra; Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 423, 95 S. Ct. 1733, 1740, 44 L. Ed. 2d 263 (1975); *Calhoon v. Harvey*, 379 U.S. 134, 85 S. Ct. 292, 13 L. Ed. 2d 190 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? *See Wheeldin v. Wheeler*, 373 U.S. 647, 652, 83 S. Ct. 1441, 1445, 10 L. Ed. 2d 605 (1963); *cf. J. I. Case Co.*

A. The Urban Mass Transportation Act Does Not Reveal Any Congressional Intention to Create a Private Cause of Action.

As in other cases, the Court should turn first to the language of the Urban Mass Transportation Act itself.[17] Section 13(c) of UMTA is set forth in full at the outset of this brief, at pages 2-3. In terms, Section 13(c) does not purport to create a private cause of action in favor of anyone. On its face, Section 13(c) neither proscribes conduct nor affects civil rights or liabilities. Rather, Section 13(c) "is only a directive to the Secretary of Labor to withhold federal funds"[18] from municipalities and other grant applicants who do not make the "fair and equitable arrangements" which the Secretary of Labor determines "*may* be necessary" to protect certain interests of transit employees affected by federal assistance. 49 U.S.C. § 1609(c) (emphasis added). Inference of a private federal cause of action is not supported where statutory language does not by its terms proscribe conduct or create or alter civil rights or liabilities. *Touche Ross*, 442 U.S. at 569, 99 S. Ct. at 2485. *See, Cannon*, 441 U.S. at 690-93 n. 13, 99 S. Ct. at 1954 n. 13.[19] Even in UMTA, where Congress

> *v. Borak*, 377 U.S. 426, 434, 84 S. Ct. 1555, 1560, 12 L. Ed. 2d 423 (1964); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394-395, 91 S. Ct. 1999, 2003-2004, 29 L. Ed. 2d 619 (1971); *id.*, at 400, 91 S. Ct. at 2006 (Harlan, J. concurring in judgment)."

422 U.S. at 78, 95 S. Ct. at 2088.

[17] *See Northwest Airlines, supra* at 1580; *Middlesex Co. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, ___ U.S. ___, 101 S. Ct. 2615, 2623 (1981); *Coutu*, 450 U.S. at 770, 101 S. Ct. at 1461; *TAMA*, 444 U.S. at 16, 100 S. Ct. at 245; *Touche Ross*, 442 U.S. at 568, 99 S. Ct. at 2485.

[18] *See Osborn v. American Ass'n of Retired Persons*, 660 F.2d 740, 744 (9th Cir. 1981).

[19] Citing a host of cases in which the Congress described its intent "with an unmistakeable focus on the benefited class" by employing language enjoining conduct ("No person shall be denied the right to vote . . .," *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 414-15 (1968)), or which explicitly created rights ("All citizens of the United States shall have the same right . . . as is

intended to proscribe conduct or to create such rights, it did so explicitly. *See* 49 U.S.C. § 1615.[20] The plain language of Section 13(c) itself, therefore, does not reveal any congressional intention to create a private federal cause of action, either explicit or implicit.

Nor does the language of the Urban Mass Transportation Act, viewed as a whole, reveal any such intention. *See Philbrook v. Glodgett*, 421 U.S. 707, 713-14, 95 S. Ct. 1893, 1898 (1975); and *Pennhurst*, 101 S. Ct. at 1540.[21] First, as noted previously, the Act is a typical federal funding statute.[22] Its purposes were clearly set forth by Congress. 49 U.S.C. 1601(b). To qualify for financial assistance,

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enjoyed by white citizens thereof . . .," *Sullivan v. Little Hunting Park*, 396 U.S. 229, 238, 90 S. Ct. 400, 405 (1969)), the Court described the "right or duty-creating language of the statute" as "the most accurate indicator of the propriety of implication of a cause of action." *Cannon*, 441 U.S. at 690-91 n.13, 99 S. Ct. at 1954 n.13. In other cases, the opinion noted, "the Court has been especially reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large." *Id.*, 441 U.S. at 692 n.13, 99 S. Ct. at 1955 n.13. The Urban Mass Transportation Act is precisely such a statute.

[20] In pertinent part, 49 U.S.C. § 1615 provides that "No person in the United States shall on the grounds of race, color, creed, national origin, sex, or age be excluded from participation in, or denied the benefits of, or be subject to discrimination under any project, program, or activity funded in whole or in part through financial assistance under this chapter . . ." The prohibitions contained in § 1615 were originally codified as 49 U.S.C. § 1608(f), simply as a prohibition of sex discrimination, incorporating the prohibitions of racial and other discrimination contained in Title VI of the Civil Rights Act of 1964 into UMTA as well.

[21] *See also Muniz v. Hoffman*, 422 U.S. 454, 469-70, 95 S. Ct. 2178, 2187 (1975).

[22] *Pennhurst*, 101 S. Ct. at 1542. In this case, as in others, the Petitioner suggests, "the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal government to terminate funds to the State." *Id.* at 1545. *See, e.g.*, 49 U.S.C. § § 1602 (f, g), 1615.

grant and loan applicants must meet numerous and complex statutory conditions, designed to serve the public's interest.[23] Far from being an act whose "unmistakeable focus" is on transit labor unions or their members, UMTA "is a statute enacted for the public benefit" whose "obivous beneficiaries . . . are the potential users of public transportation." *Assoc. Businesses of Franklin v. Warren Co., etc.*, 522 F. Supp. at 1019.[24] Contrary to the findings of the Sixth Circuit in this case, UMTA was not "enacted for the 'especial benefit' of transit employees . . ." *Local Div. 1285 v. Jackson Transit Auth.*, 650 F.2d at 1384. At most, the Union and its members are only "secondary beneficiaries" of the Act, who may seek to advance only "a subsidiary purpose of the statute . . ." *People's Housing Dev. Corp. v. Poughkeepsie,* 425 F. Supp. 482, 490 (S.D.N.Y. 1976).

Moreover, the structure of the Act strongly suggests that in enacting UMTA the "Congress provided precisely the remedies it considered appropriate." *Middlesex Co. Sewerage Auth. v. Nat'l Sea Clammers Ass'n.*, ___ U.S. ___, 101 S. Ct. 2615, 2623 (1981). First, and most obviously, the Act contemplates that "No financial assist-

[23] *See* 49 U.S.C. § § 1604(g), 1607 (long range planning); 1604 (h, i), 1610, (economic and social effects and environmental impact); 1606 (relocation assistance); 1608, 1611 (record keeping); 1612 (handicapped and elderly citizen, special efforts); 1615 (non-discrimination); and 1609 (labor).

[24] Unlike the provisions of 20 U.S.C. § 1681, construed in *Cannon,* which, as enacted, provided that "No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to any discrimination under any educational program or activity receiving federal financial assistance . . .", *id.*, 441 U.S. at 682 n.3, 99 S. Ct. at 1950 n.3; *compare* 20 U.S.C. § 1681 *with* 49 U.S.C. § 1615; most of the provisions of UMTA, including Section 13(c) are "written simply as a . . . prohibition against the disbursement of public funds" to those State and local public bodies who do not agree to the conditions of assistance created by the Act. *Cannon,* 441 U.S. at 690-92, 99 S. Ct. at 1955. *Compare, e.g.,* 49 U.S.C. §§ 1602 (e, f, g) *with Cannon,* 441 U.S. at 690-92, 99 S. Ct. at 1955 n.14. Under such circumstances the Court has stated, "there is far less reason to infer a private remedy in favor of individual persons." *Id. See also Coutu,* 450 U.S. at 772, 101 S. Ct. at 1462.

ance shall be provided" unless the conditions of assistance set forth in the Act are met. *See, e.g.*, 49 U.S.C. §§ 1602 (e,f,g), 1604, 1606, 1611(b). *See also Local Div. 589, etc. v. Massachusetts*, ___ F.2d ___ (1st Cir. 1981) (Supplemental Pet. Apx. at 33a-34a). Second, the Act expressly grants the Secretary of Transportation authority, under certain circumstances, to investigate alleged violations of certain grant agreements, 49 U.S.C. § 1602(f), to bar grant recipients "from the receipt of further financial assistance . . .", 49 U.S.C., §§ 1602(f,g), 1615, and to take other "appropriate action to correct the violation under the terms and conditions of the agreement," 49 U.S.C. §§ 1602(f), 1608(e), 1615. Third, the Act was amended in 1978 specifically to provide remedies for violation of the Act's non-discrimination provisions, including a civil action by the Attorney General for appropriate relief. 49 U.S.C. § 1615. Finally, and perhaps most importantly, Section 12 of the Act provides that the Secretary shall "have the functions, powers, and duties set forth in section 1749a of the Title 12, except subsections (c)(2) and (f) of such section." 49 U.S.C. § 1608(a). Among the "functions, powers, and duties" conferred upon the Secretary by Section 1749a of Title 12 is the authority to "sue and be sued." Hence, it might be inferred that Congress intended the Secretary to be capable by suit of enforcing compliance with the provisions of an UMTA grant agreement.[25] In this

[25] Although the Sixth Circuit stated "that if the Act had provided any administrative mechanism under Section 13(c)," its resolution of the questions concerning implication of a private cause of action presented in this case "might have been altogether different," *Local Div. 1285 etc. v. Jackson Transit Auth.*, 650 F.2d at 1385, it found that the "Act offers no administrative solution to the problem of enforcing Section 13(c) agreements." *Id. See Local Div. 589, etc. v. Massachusetts*, ___ F.2d ___ (1st Cir. 1981) (Supplemental Pet. Apx. at 33a-34a). The Sixth Circuit apparently found none of the other provisions of UMTA, which concern enforcement of grant conditions, to be applicable unless the court were to "impute to the Secretary of Transportation the responsibility for handling labor relations disputes — an incongruous result which we decline to reach without a clear Congressional directive . . ." *Local Div. 1285, supra*. Yet, absent any "clear Congressional directive" the court

case, as in others, it is obvious that when Congress wished to provide a remedy, it knew how to do so, and did so expressly. *Touche Ross*, 442 U.S. at 572, 99 S. Ct. at 2487; *TAMA*, 444 U.S. at 21, 100 S. Ct. at 248; *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 471, 79 S. Ct. 904, 908-09 (1959); *Nat'l R.R. Passenger Corp. v. Passengers Ass'n*, 414 U.S. at 458, 94 S. Ct. at 693. It is "an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it," for, when Congress includes a variety of express provisions for enforcement of statutory terms, it is highly improbable that "Congress absentmindedly forgot to mention an intended private action." *Cannon*, 441 U.S. at 742, 99 S. Ct. at 1981 (Powell, J., dissenting); *TAMA*, 444 U.S. at 19, 100 S. Ct. at 247; *Middlesex Co. Sewerage Auth.*, 101 S. Ct. at 2623; *Northwest Airlines*, 101 S. Ct. at 1582 n. 30. That canon applies with equal force to this case.

In sum, the language and structure of UMTA, including the language of Section 13(c) itself, support the conclusion that Congress did not create any federal right in favor of the Respondent Union and its members; that the Act was not enacted for their "especial benefit"; and that the Congress did not, by passing UMTA into law, create any private federal cause of action, either express or implied, in the Union's behalf.

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was willing to imply a private cause of action. *Compare Rivers v. Rosenthal Co.*, 634 F.2d 774, 783 (5th Cir. 1980), holding that "an implied right of action ordinarily may be recognized only upon clear evidence that Congress affirmatively intended to provide such a remedy. *See Touche Ross*, 442 U.S. at 568, 99 S. Ct. at 2485," and that " 'those who contend a statute has endowed them with a cause of action must establish that proposition', and their failure to demonstrate Congress' intent to provide a cause of action compels denial of such actions. *Rogers v. Frito-Lay*, 611 F.2d at 1085."

B. The Legislative History of the Act Does Not Support Inference of a Private Action in Favor of Transit Unions.

The Sixth Circuit correctly found that "the Legislative history of Section 13(c) is simply not explicit." *Local Div. 1285, etc. v. Jackson Transit Auth.*, 650 F.2d at 1384. The precise means by which the conditions established by Section 13(c) might be enforced "was not discussed." *Id.* at 1384-85.[26] Although such congressional silence is not necessarily fatal to the inference of a private federal cause of action, *TAMA*, 444 U.S. at 18, 100 S. Ct. at 246, the inference of "a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Touche Ross*, 442, U.S. at 571, 99 S. Ct. at 2487, *citing Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64, 98 S. Ct. 1670, 1680 (1978).

To the extent that the legislative history of the Act is illuminating, it reveals that the protection of urban mass transit employees and their unions "was at best a secondary concern." *Cort v. Ash*, 422 U.S. at 81, 95 S. Ct. at 2089.[27] Though it recorded its desire to increase employment, the Congress clearly stated that "[i]n the transit industry, . . . the *first objective* is to upgrade facilities and equipment with the best that is at present available." [1964] *U.S. Code Cong. & Ad. News* at 2577 (emphasis supplied). It added that UMTA was enacted principally "to assist states and localities in financing the

[26] Nothing in the legislative history of the Act indicates any legislative discussion of whether private claimants should be afforded a federal judicial remedy. *See, e.g.*, [1964] *U.S. Code Cong. & Ad. News*, 2569 *et seq.*; 109 Cong. Rec. 5018-20, 5344-53, 5356-59 (daily ed., April 1 & 4, 1963); 110 Cong. Rec. 15453-54 (daily ed., June 30, 1964).

[27] *See e.g. Hearings on S.6 and S.917 Before the Subcommittee on Housing of the Senate Banking and Currency Committee*, 88th Cong., 1st Sess. (1963), at 376 (statement of Bernard Cushman, General Counsel, Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of America, AFL-CIO), stating that the "central theme" of UMTA "is not labor", but rather "Federal aid to mass transportation." The Amalgamated Association of Street, Electric Railway, and Motor Coach Employees is now the Amalgamated Transit Union, the parent union of the Respondent in this case.

capital facilities and equipment needed for extension and improvement of comprehensively planned urban mass transportation facilities," and to revive and strengthen such facilities "to provide a basic part of local transportation service that will help to reduce street and highway congestion and to form a sound framework for the future transportation needs of our expanding urban economy." [1964] *U.S. Code Cong. & Ad. News* at 2572.

Insofar as the Congress manifested its regard for the status of transit workers affected by federal funding under UMTA, incidental to its larger concern for the betterment of urban transportation facilities, it intended only to protect "the rights and privileges which have been already established and preserving their *status quo*," [1964] *U.S. Code Cong. & Ad. News* at 2584, and not to create any new federal rights in favor of such workers, *Cort v. Ash*, 422 U.S. at 78, 95 S. Ct. at 2088. *See Cannon*, 441 U.S. at 690-93, 99 S. Ct. at 1954-56; *and Touche Ross*, 442 U.S. at 569, 99 S. Ct. at 2485.[28] The congressional intent merely to preserve the *status quo*, and not to create new rights, was

[28] *See especially Loc. Div. 580, etc. v. Central N.Y. Regional Transit Auth.*, 556 F.2d 659, 662 (2d Cir. 1977), finding it "reasonably clear that § 13(c) was intended to preserve the rights of employees under existing collective bargaining agreements and to maintain the *status quo* with respect to the employer's obligation to bargain collectively, *not to create any new rights for the employees or enhance existing ones . . .*" Hence, while the Congress responded to the concerns of labor organizations for "the possible effects of automation and the impact which public acquisition of existing private companies may have on the established status and bargaining rights of employees," it stated its intention only "that Federal funds should not be used in a manner that is directly or indirectly detrimental to the legitimate interests and rights of such workers," and that existing transportation companies should remain in business to improve the chances of "those presently employed in existing private mass transit service . . . for continued employment." [1964] *U.S. Code Cong. & Ad. News* at 2584.

repeated frequently in both congressional debates[29] and hearings[30] on Section 13(c).

As originally drafted, UMTA contained no labor protection provisions like those contained in Section 13(c). Those provisions were suggested in 1963 by then Secretary of Labor Willard Wirtz, on behalf of the Kennedy Administration, after discussions with labor leaders.[32] Introducing the legislation to the Subcommittee on Housing of the Senate Banking Committee, Secretary Wirtz described the provisions as one concerned with the "transitional effects" of UMTA "upon particular employee groups."[33] Responding to questions concerning the effect of the provisions on collective bargaining agreements existing at the time federal funding is granted, and those which might be concluded thereafter, Secretary Wirtz stated that Section 13(c) "is intended to cover those employees, present employees, whose interests would be adversely affected by a change, and it would not be intended to establish

[29] *See, e.g.*, 109 Cong. Rec. 5345, 5346, 5347, 5348, 5351, 5357, 5358 (daily ed. April 4, 1963) (remarks of Sen. Morse). Senator Morse, one of the proponents of Section 13(c) expressed this intention most clearly, in his colloquy with Senator Goldwater, quoted *infra* at pages 28 to 30. *See* 109 Cong. Rec. 5347 (daily ed. April 4, 1963) (emphasis supplied).

[30] *See, e.g., Hearings on H.R. 3881 Before the House Banking and Currency Committee*, 88th Cong., 1st Sess. (1963) (statements of Secretary of Labor Willard Wirtz, at 475-487; and Bernard Cushman, *especially* at 633) (hereinafter "*House Hearings*"); *Hearings on S.6 and S.917 Before the Subcommittee on Housing of the Senate Banking and Currency Committee*, 88th Cong., 1st Sess. (1963) (statements of Secretary Wirtz, at 307-318; Andrew J. Biemiller, at 319; *and* Bernard Cushman) (hereinafter "*Senate Hearings*").

[31] *Local Div. 589, etc. v. Massachusetts*, ___ F.2d ___ (1st Cir. 1981) (Supplemental Pet. App. at 20a).

[32] *Id.*

[33] *Id.*, at 21a. *See Senate Hearings* at 308.

protections for the future as far as new employees are concerned." *Senate Hearing* at 317.[34]

The understanding of the Senate that the protections afforded by Section 13(c) were not designed to create any federal rights is further clarified by the discussion in the Senate of the alternative bill sponsored by Senator Lausche of Ohio. As introduced, the Lausche bill, S.807, 88th Cong., 1st Sess. (1963), would have provided federal assistance to urban mass transit systems through federal guarantees of state revenue bonds issued for the construction of transit facilities. On March 8, 1963, the day of Secretary Wirtz' testimony before the Senate Subcommittee, Senator Williams, one of the sponsors of the Administration's version, strongly criticized the Lausche bill because it would create "a grave risk of large-scale federal intervention in local transit affairs." 109 Cong. Rec. 3622-23 (daily ed., March 8, 1963 (remarks of Sen. Williams). The Senator compared the Lausche bill with the "clearer and more prudent approach" of the Administration's proposal, which was ultimately enacted:

> Under the administration bill, the Federal Government must weigh the proposals submitted by the States or local governments . . . The Federal Government will make a grant on the basis of its best estimate of the likelihood that the project will be sound and successful, based on careful local planning — a provision lacking in the bill of the Senator from Ohio.
>
> *And then the Federal responsibility terminates.*
>
> If the project proves in later years not to be as successful as original estimates indicated, *it will be the responsibility of the State or local government — not of the Federal Government.*
>
> * * * * * *

[34] *See also Senate Hearings* at 314. Senator Douglas also questioned Secretary Wirtz about the subject, stating that it was the Senator's understanding "that collective bargaining rights shall not be impaired, but *future* collective bargaining rights are not necessarily guaranteed." Secretary Wirtz replied "Yes; I think that is right." *Id.* (emphasis added).

> *Not only does the Federal Government's financial responsibility terminate when a grant is made; its interest terminates, as well. Once the grant is made, all responsibility for the matters I have just mentioned remains where it belongs — at the local level.*
>
> I feel confident that the vast majority of the Members of Congress would prefer this much cleaner and more prudent approach.

109 Cong. Rec. 3623 (daily ed., March 8, 1963) (emphasis supplied). In short, both the Secretary of Labor and Senator Williams characterized the "federal interest" as "transitional", terminating once an UMTA grant is made.[35] Secretary Wirtz specifically noted that no collective bargaining agreement concluded after the making of such a federal grant would be affected by the grant. In the view of those spokesmen for Section 13(c), the 1975 collective bargaining agreement between the Union and Jackson would be unaffected by the 1966 Section 13(c) agreement, because, by 1975, some 9 years after federal assistance was given to Jackson, the "transitional" period following that grant surely had passed. Given the denial of any continuing "federal interest" in local transit labor relations following federal assistance, it is clear that the Congress did not, by enacting UMTA, intend to create any federal rights in favor of transit unions and their members.

The conclusion that Congress did not intend to "federalize" municipal transit labor relations is further supported by its rejection of union proposals which would have included in Section 13(c) the requirement that protective arrangements "shall include . . . enforcible provisions requiring" certain elements. *Senate Hearing* at 323 (March

[35] This conclusion is reinforced by Congress' rejection of a labor-sponsored proposal which would have made the "protective arrangements" contemplated by Section 13(c) applicable not only "to employees of existing mass transportation systems" but also to "employees employed on any new project, system, line, operation, or facilities . . ." *Senate Hearings* at 322 (statement of Mr. Biemiller).

8, 1963) (statement of Mr. Biemiller). Describing the difference between the labor proposal and the Administration's version of Section 13(c), Robert C. Weaver, Federal Housing Administrator at the time, stated that the "proposal of the labor organizations would make all detailed requirements mandatory, while the Secretary of Labor draft allows discretion in applying the provisions to the circumstances of each case." *Senate Hearing* at 482. As reported by the Senate Committee, and as adopted by the Congress, Section 13(c) contained none of the "mandatory" language which the labor unions proposed.[36] As ultimately adopted, Section 13(c) did not by its terms proscribe any conduct or create or alter any civil rights or liabilities. *Touche Ross,* 442 U.S. at 569, 99 S. Ct. at 2485. *See Cannon,* 441 U.S. at 690 n.13, 99 S. Ct. at 1954 n.13. Instead, Section 13(c) accurately reflected the congressional intent that "specific" conditions for worker protection "normally will be the product of local bargaining and negotiation," [1964] *U.S. Code Cong. & Ad. News* at 2584-85, and not the product of federal executive or judicial intervention. In the face of that declared intention, the Court should be cautious to suppose that, by enacting UMTA, Congress meant to shift a large body of litigation concerning municipal transit labor relations from state to federal courts. Such caution is particularly appropriate in light of repeated congressional declarations that Section 13(c) would not alter the exemption of municipalities from application of the National Labor Relations Act and, more generally, would not preempt or supersede state law. *Local Div. 589, etc. v. Massachusetts,* ___ F.2d ___ (1st Cir. 1981) (Supplemental Pet. Apx. at 19a-30a).

The lengthy debate between Senator Morse, one of the sponsors of Section 13(c), and Senator Goldwater, one of its opponents, concerning the amendment to UMTA which ultimately became Section 13(c), illustrates the congressional understanding of its actions:

> *Mr. Goldwater* . . . My fear is that if there were a State law which prohibited a strike against any

[36] *See Local Div. 589, etc. v. Massachusetts,* ___ *F.2d* ___ *(1st Cir. 1981) (Supplemental Pet. Apx. at 21a-22a).*

segment of government, this language might preempt that State law.

Mr. Morse. For the purpose of establishing the legislative history, let me assure the Senator from Arizona that such is not the intention of this language. *Here we are talking, too, about the status quo; and whatever the status quo was in regard to that situation, it would continue to prevail: Furthermore, we are also talking about a municipally owned and operated transit company, not covered by the Taft-Hartley Act.*

* * * * * *

Mr. Goldwater . . . It has already been stated as national policy that collective bargaining is to be encouraged. It is also a part of national policy that State or political subdivisions thereof are excluded.

My fear about the existing part of the act and the amendment proposed by my friend from Oregon is that either the language of the bill or that proposed by the Senator — and they are almost identical — will be interpreted by the Administrator of the NLRB or some court as preempting State laws that cover the field at the present time.

One final word of assurance from the Senator from Oregon that the intentions expressed in the definitions part of the Taft-Hartley Act will not be violated would be of great help on that point if we are ever attacked in relation to it.

Mr. Morse. The very reason that the language in the bill reads as it does is in order to make it clear that the Taft-Hartley exemptions are not changed by the amendment.

I cannot emphasize the point more than I already have done in the legislative history in our debate. It deals with municipal and State problems and not Federal problems.

Mr. Goldwater. Then, as a final word, the language proposed by the Senator from Oregon or the language of the bill as it now stands in no way would preempt State law.

Mr. Morse. The answer is yes; and particularly as I have mentioned. If the collective bargaining should be taken over by a public agency in the exceptional case described, the right to strike against the public agency would be taken away from labor. But that is not a contractual right; it is not among the contractual rights the State agency must recognize in order to have an application for aid considered.

Mr. Goldwater. The right to strike against the public agency.

Mr. Morse. Against the public agency where the State or local law forbids the right to strike.

Mr. Goldwater. If there is local law, the language of the Senator from Oregon would not prevail.

Mr. Morse. The Senator is correct.

Mr. Goldwater. If there is not a local law, would it be the interpretation of the Senator from Oregon that employees could strike in spite of the language in the "definitions" clause of the Taft-Hartley Act?

Mr. Morse. In the absence of any local law, it would be for the State court to decide whether they had that right.

109 Cong. Rec. 5346-48 (daily ed., April 4, 1963) (emphasis added). In the view of the Senate floor leader on Section 13(c), therefore, the protective arrangements contemplated by that section were not intended to supersede or preempt any state law, or to displace or alter the exemption from federal labor regulation for municipal labor relations contained in the Taft-Hartley Act. And, in the view of Senator Morse, in the only mention of possible litigation, it was contemplated that the decision whether a collective bargaining contract or protective arrangements made under Section 13(c) conferred upon state transit employees a "right to strike" despite the language of the Taft-Hartley Act, "would be for the *State court* to decide . . ." 109 Cong. Rec. 5348 (daily ed., April 4, 1963) (remarks of Sen. Morse) (emphasis supplied). Only in "rare cases in which local law prohibits collective bargaining", Senator Morse

stated, would the availability of federal financial assistance under the Act be questionable. 109 Cong. Rec. 5359 (daily ed., April 4, 1963).[37]

Similarly, in later debates between Senator Williams, another sponsor of the legislation, and Senator Goldwater, the concerns that "federal domination" should not follow the "federal purse strings", and that the Act should not affect "the right of the states, local governments and communities to regulate and manage their affairs and their arrangements with their employees free from Federal interference and control,"[38] were addressed and put to rest:

> *Mr. Williams of New Jersey . . . This provision is truly ancillary to the thrust of the transportation program.* It is only included in the interest of fairness and equity. If as a result of the expenditure of Federal funds, a railroad employee having a lifetime of contributions to a pension system were to lose it because his railroad was taken over by the public, that would be grossly unfair. This provision protects those rights which have been hard earned and enables them to continue.
>
> *The legislative history has to be corrected, however, because if the bill shall be enacted, we must have a record that will show that the bill does not preempt State law; it does not control or dominate with irrevocable authority local situations. The bill provides for the encouragement of collective bargaining. That does not put the force of a mandate on a community.* Although I am a lawyer, I am rather rusty for lack of practice. However, I do not believe we can pass a law which would change State law; and we do not attempt to do so. The bill encourages collective bargaining.

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[37] Even in such cases, Secretary of Labor Wirtz suggested that "he would search for ways to work out arrangements that would allow the state to participate in the program." *Local Div. 589, etc. v. Massachusetts*, ___ F.2d ___ (1st Cir. 1981) (Supplemental Pet. Apx. at 21a-22a), *citing House Hearings* at 482-83, 484-85.

[38] 109 Cong. Rec. 5415 (remarks of Sen. Goldwater).

109 Cong. Rec. 5417 (daily ed., April 4, 1963) (emphasis added). Senator Williams' discourse with Senators opposing his amendment continued:

> *Mr. Tower.* Mr. President . . . *The intent has generally been expressed that we are not trying to break State law, we are not trying to supersede or nullify State law.* Therefore, there does not seem to me to be any reason why we cannot provide specifically in the bill that our intent is not to supersede State law, and include a provision that the language will apply insofar as it is consistent with the laws of the States. *That is the least we can do if in reality it is our intent not to try to nullify State laws.*
>
> *Mr. Williams of New Jersey.* Mr. President, this proposition was discussed in connection with a previous amendment. It seems to me that we have one or two very simple propositions. *If the requirement of the amendment that the program be consistent with State law is tantamount to meaning that the program cannot supersede or preempt or override State law, this is, in my judgment, a dangerous amendment, for one very important reason: It is unnecessary to include it at this point, because it gives the clear implication that it is needed. If the provision is needed, we will find, day after day in this Chamber, that it will have to be put in on the record made on this bill. I believe it is good doctrine that one should never write into legislation what clearly is unnecessary; to do so opens a dangerous precedent for the future. That is simply my position.*
>
> (109 Cong. Rec. 5421) (emphasis supplied).

The record of hearings in both the Senate[39] and the House of Representatives[40] is replete with similar statements of congressional intent, as is the record of the

[39] *See e.g., Senate Hearings* at 312-13 (remarks of Secretary Wirtz).

[40] *See e.g., House Hearings* at 481-81, 486 (remarks of Secretary Wirtz).

debate on the House floor.[41] The conclusions to which these repeated statements inevitably lead were well stated by the First Circuit, in *Local Div. 589, etc. v. Massachusetts:*

> First . . . the history quoted above suggests that the senators and congressmen who drafted, sponsored, and voted for the bill believed that § 13(c) would not override any state law. And, there is no indication at all that both the statute and the detailed assurances given pursuant to § 13(c) were intended to predominate in case of conflict.
>
> Second, if as the Transit Union contends, § 13(c) assurances override state law, Congress, in enacting § 13(c), to a significant extent federalized collective bargaining with local transit unions . . . To give these documents the authority of federal law overriding state law to the contrary would transfer predominate legal authority for local transit labor relations from state to federal government. The statute would have created a federal involvement in local transit labor relations akin to that which now exists with respect to railroad and airline workers. *See generally International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 687 (1963).
>
> Whether or not such a federal presence is desirable, we cannot interpret the ambiguous language of § 13(c) to create it without a fairly clear indication that such was Congress's intent. Unlike railway and airline workers, we are here considering workers for local transit companies whose employers, by and large, are municipalities or state governments. . . . Had Congress intended to grant the Secretary of Labor NLRB-type (or more) power to override state law governing these local public employees, one would expect to find some indication that Congress at least thought about the matter. But instead, the legislative history is silent. Not a word indicates that Congress intended such a result. The unions in 1963 urged no such outcome.

[41] *Local Div. 589, etc. v. Massachusetts*, ___ F.2d ___ (1st Cir. 1981) (Supplemental Pet. Apx. at 30a), *citing* 110 Cong. Rec. 14980 (remarks of Representatives Multer and Rains).

> To the contrary, the legislative history suggests that Congress was sensitive to the local nature of local transit . . .

___ F.2d ___ (1st Cir. 1981) (Supplemental Pet. Apx. at 30a-32a). *See also Local Div. 1285, etc. v. Jackson Transit Auth.*, 447 F. Supp. at 93.

Hence, although the legislative history of Section 13(c) is silent concerning the precise means by which the conditions established by Section 13(c) arrangements might be enforced,[42] the available evidence strongly suggests that Congress did not intend to create any rights in favor of transit unions and their members, or to create any private federal cause of action. Rather, Congress enacted UMTA as a "typical funding statute",[43] containing simple "directives"[44] to the Secretaries of Labor and Transportation to require compliance with certain conditions of assistance. Nothing suggests that Congress meant for those conditions to be enforced other than through "the typical remedy for state noncompliance with federally imposed conditions." That remedy "is not a private cause of action but rather action by the Federal government to terminate funds to the State." *Pennhurst*, 101 S. Ct. at 1545. In the absence of any indication that Congress intended to create any private federal cause of action, the Court's "inquiry is at an end." *TAMA*, 444 U.S. at 24, 100 S. Ct. at 249; *Sierra Club*, 101 S. Ct. at 1781 (majority), 1784 (Rehnquist, J., concurring).

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[42] Such silence, the Court has noted, serves to confirm that Congress was concerned not with private rights but with other public interests. *See Sierra Club*, 101 S. Ct. at 1780.

[43] *Pennhurst*, 101 S. Ct. at 1542.

[44] *See Osborn v. Amer. Ass'n of Retired Persons*, 660 F.2d at 744.

C. To Imply a Private Federal Remedy Would be Inconsistent with the Underlying Purpose of the Legislative Scheme and Would Improperly Shift to the Federal Courts a Body of Litigation Traditionally Relegated to State Law in an Area Basically the Concern of the States.

There is no evidence in the language and structure of UMTA, or in its legislative history, that Congress envisioned any private remedy. That being the case, as the Court has stated, "it is unnecessary to inquire further to determine whether the purpose of the statute would be advanced by the judicial implication of a private action or whether such a remedy is within the federal domain of interest." *Sierra Club*, 101 S. Ct. at 1781 (majority), 1784 (Rehnquist, J., concurring); *Northwest Airlines*, 101 S. Ct. at 1582 n. 31; *Coutu*, 450 U.S. at 770-71 n. 21, 101 S. Ct. at 1461 n. 21; *Touche Ross*, 422 U.S. at 579-80, 99 S. Ct. at 2490-91 (majority), 2491 (Brennan, J., concurring). Nevertheless, in this case, such an inquiry reveals that judicial inference of a private cause of action would be inconsistent with the announced purposes of UMTA and would countenance an unintended federal invasion of "an area basically the concern of the States." *Cort v. Ash*, 422 U.S. at 78, 95 S. Ct. at 2088.

As has been noted previously, UMTA was enacted to treat legislatively the growing problem of "satisfactory movement of people and good within urban areas". The "central theme" of the Act "is not labor", but rather "Federal aid to mass transportation." *See* note 27, *supra*, and 49 U.S.C. § 1601(b). Indeed, UMTA "is a statute enacted for the public benefit" whose "obvious beneficiaries . . . are the users of public transportation." *Assoc. Businesses of Franklin v. Warren Co., etc.*, 522 F. Supp. at 1019. The stated purpose of Congress was not to create a body of substantive federal law to govern the resolution of every labor related dispute between a local transit system and its employees. Surely, if the Congress intended every suit "for violation of contracts between an employer and a labor organization," whether a collective bargaining

agreement or a Section 13(c) agreement, to "be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties", it clearly knew how to say so. *See* 29 U.S.C. § 185. It did not choose to do so in the Urban Mass Transportation Act.

To infer a private cause of action here, where Congress has provided none, "would lead to numerous suits against the local [transit] authority . . . and the underlying purposes of the legislative scheme would be thwarted." *M.B. Guran Co., Inc. v. City of Akron*, 546 F.2d 201, 205 (6th Cir. 1976). Indeed, the forecast of a downpouring of such suits has already proven accurate. A large number of suits have already been filed in United States District Courts involving collective bargaining agreements[45] and

[45] *See, e.g., Local Div. 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Auth.*, No. C81-774A (N.D. Ga. June 24, 1981) (suit to enforce arbitration award); *Local Div. 589, Amalgamated Transit Union v. Mass.*, 511 F. Supp. 312 (D. Mass. 1981) (interest arbitration); *Division 788, Amalgamated Transit Union v. Bi-State Dev. Agency of Missouri-Illinois Metropolitan Dist.*, No. 80-1339-C(4) (E.D. Mo Feb. 26, 1981) (dismissed per stipulation); *Division 174 and Div. 1037, Amalgamated Transit Union v. Southeastern Regional Transp. Auth.*, No. 80-2427-S (D. Mass. Feb. 25, 1981) (preliminary injunction to compel interest arbitration); *Division 587, Amalgamated Transit Union v. Municipality of Metropolitan Seattle*, No. 80-3235 (9th Cir. 1980) (compelling interest arbitration); *Local Div. 1235, Amalgamated Transit Union v. Metropolitan Area Transit Auth.*, Nos. 80-3452 and 79-3275 (M.D. Tenn. Oct. 16, 1980) (enforcing arbitration award); *Local Div. 732 Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Auth.*, No. C80-1601A (N.D. Ga. Oct. 2, 1980) (construing contract to determine alleged unilateral violation of clause limiting overtime); *Division 1575, Amalgamated Transit Union v. Golden Gate Bridge, Highway and Transp. Dist.*, No. C-79-2278 WHO (N.D. Cal. May 27, 1980) (construing contract, union shop agreements); *Division 1287 v. Kansas City Area Transp. Auth.*, No. 77-0663-CV-W-2 (W.D. Mo. Feb. 21, 1980) (federal law must be used to interpret pension claim under § 13(c) contract); *Division 1212, Amalgamated Transit Union v. Chattanooga Area Regional Transp. Auth.*, 483 F. Supp. 37 (E.D. Tenn.

other matters tangentially related to municipal transit labor relations and funding.[46] Others are certain to follow. The damage inflicted upon municipal transit systems, and upon the achievement of the Congress' purposes in enacting UMTA, which will result from such a storm of federal litigation, is inestimable.

It is obvious that local courts are particularly well suited to apply state laws and to understand the full impact of litigation upon municipalities and their labor relations.[47] It was with that understanding that Congress long ago exempted state and municipal labor relations from federal regulation under the National Labor Relations Act. 29 U.S.C. § 152(2). The Senate debates concerning UMTA Section 13(c) make explicit the intention of Congress "that the Taft-Hartley exemptions" described above "are not changed" by Section 13(c). 109 Cong. Rec. 5348 (daily ed., April 4, 1963) (remarks of Senator Morse). Hence, the Congress understood that labor relations between UMTA grant recipients and their employees were "an area basically the concern of the States." *Cort v. Ash*,

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1979) (interest arbitration); *Division 177, Amalgamated Transit Union v. Tidewater Transp. Dist. Comm'n*, No. 79-968-N (E.D. Va. Nov. 8, 1979) (interest arbitration); *Division 1309, Amalgamated Transit Union v. San Diego Transit Corp.*, No. 78-1093-E (S.D. Cal. Jan. 9, 1979) (compelling arbitration).

[46] Federal Courts have recently become involved in local transit fare increase disputes, *see City of Atlanta v. MARTA*, 506 F. Supp. 883 (N.D. Ga. 1980), *aff'd* 636 F.2d 1084 (5th Cir. 1981), *and Andrechek v. Port Auth. of Allegheny Co.*, Civil No. 80-222 (W.D. Pa. 1980), as well as local transit service cut disputes. *See Cohen v. MBTA* (D. Mass. No. 81-791), *aff'd* 647 F.2d 209 (1st Cir. 1981).

[47] *See Sumner v. Mata*, 449 U.S. 539, 549, 101 S. Ct. 764, 770 (1981), in which Justice Rehnquist remarked:

> State judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinions as to how that document should be interpreted that all are not doing their mortal best to discharge their oath of office.

422 U.S. at 78, 95 S. Ct. at 2088.[48] Litigation between municipal transit labor unions and UMTA participants was not only forseeable, but forseen. *See* 109 Cong. Rec. 5348 (remarks of Senator Morse), 5421 (remarks of Senator Miller). Yet, no indication appears in the legislative history of UMTA that Congress meant for any such litigation to be pursued in federal court. Rather, the only express reference is to the contrary. 109 Cong. Rec. 5348 (remarks of Senator Morse).

Throughout the life of the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*, the regulation of state and local government labor relations has been left to the States. *See Abood v. Detroit Bd. of Education*, 431 U.S. 209, 223, 97 S. Ct. 782, 1793 (1977). *See also N.L.R.B. v. Natural Gas Utility Dist. of Hawkins Co.*, 402 U.S. 600, 91 S. Ct. 1746 (1971); *Crilly v. Southeastern Pa. Transp. Auth.*, 529 F.2d 1355 (3d Cir. 1976); *and Local Div. 589, A.T.U. v. A.T.U.*, 295 F. Supp. 630 (D. Mass. 1969). Many states have chosen to enact statutes governing public employee relations. *See Abood, supra. See also, e.g.*, Wisc. Stat. § 111.70 (Wisconsin Municipal Employment Relations Act); N.Y. Civ. Serv. Law § 209 (N.Y. Public Employment Relations Act). Others, like Tennessee, have enacted statutes which, in authorizing the creation of municipal transit authorities, parallel the provisions of UMTA Section 13(c). *See* Tenn. Code Ann. § 6-3802. *See also, e.g.*, Conn. Gen. Stat. § 7-273(i); Del. Code Ann., Title 19, § 802; Ill. Rev. Stat., Ch. 111 2/3, §§ 702.15 and 702.16(a); Ind. Code Ann. § 19-5-2-23; Ky. Rev. Stat., § 96A.200; Md. Code Ann., Transp. Art., § 7-601 et seq.; Or. Rev. Stat. § 267.235; Utah Code Ann., § 11-20-30; and Va. Code § 15.1-1357.2. There

[48] Indeed, it could not have been otherwise. The States are endowed with constitutional authority to make "essential decisions regarding the conduct of integral government functions", including decisions about the "structure" of public employee-employer relations, free from congressional interference. *See National League of Cities v. Usery*, 426 U.S. 833, 851-2, 855, 96 S. Ct. 2465 (1976). *See also United Transp. Union v. L.I.R.R.*, 634 F.2d 19, 27 (2d Cir. 1980), *cert. granted* ___ U.S. ___, 69 L. Ed. 2d 970 (1981).

is no evidence that the state courts have been reluctant to entertain contract claims by labor unions, based on collective bargaining agreements, in any state in which collective bargaining with public employees is permitted.[49] Instead, it may be said that a cause of action, founded on a collective bargaining agreement between a municipality and its employees, is one "traditionally relegated to State law." *Cort v. Ash*, 422 U.S. at 78, 95 S. Ct. at 2088; *Local Div. 1285, etc. v. Jackson Transit Auth.*, 447 F. Supp. at 94.

In sum, inference of a private federal remedy in this case is not supported by the language of UMTA, its legislative history, or its underlying purpose and structure. Moreover, in view of congressional declarations that state law concerning municipal labor relations would not be preempted or superseded by UMTA, it is highly unlikely that Congress intended to supplant existing state remedies. *Northwest Airlines*, 101 S. Ct. at 1580; *Cort v. Ash, supra*. The Sixth Circuit's inference of such a cause of

[49] In at least two cases, brought by the Union and cited in its *Brief in Opposition*, State courts in California have been called upon to resolve municipal transit labor disputes arising from Section 13(c) Agreements. *See Local 192 v. Alameda-Costa Transit District*, No. 513665-4 (Sup. Ct. of Calif.); and *Division 276 v. Stockton Metropolitan Transit District*, No. 146157 (Sup. Ct. of Calif.), *cited* in *Brief in Opposition* at 6-7 n.5. In at least two other cases, transit labor unions have filed suit against municipal transit systems in state courts, seeking to enforce what the Union beleived were rights under collective bargaining agreements, *Local 589, etc. v. MBTA*, C.A. No. 45919 (Suffolk, Mass. Sup. Ct.), *cited* in *Local Div. 589, etc. v. Massachusetts*, 511 F. Supp. 312 (D. Mass.), *modified* ___ F.2d ___ (1st Cir. 1981) (Supplemental Pet. Apx. 1a-55a), or under state collective bargaining laws, *see United Transp. Union v. L.I.R.R.*, 634 F.2d 19, 21 (2nd Cir. 1980), *cert. granted* ___ U.S. ___, 69 L. Ed. 2d 970 (1981), before resorting to the federal courts. *See also Local Div. 732 v. MARTA*, Civ. No. 67766 (Sup. Ct., Fulton Co., Ga. 1980). In still another case, *McDonald v. Stockton Metropolitan Transit District*, 36 Cal. App. 3d 436, 111 Cal. Rptr. 637 (3d Dist. 1973), two individual bus users sued in state court to compel the transit district to install 20 bus stop shelters, purportedly as beneficiaries of an UMTA grant agreement. In short, relief for the unions is clearly available in the state courts.

action in this case was, therefore, erroneous, and its judgment should be reversed. The judgment of the United States District Court for the Western District of Tennessee, finding no such cause of action, and, therefore, dismissing the Union's action for lack of federal subject matter jurisdiction, should be affirmed.

III.

BY ENACTING UMTA, CONGRESS DID NOT CREATE A NEW FEDERAL COMMON LAW OF TRANSIT LABOR RELATIONS.

The Union has suggested that the reasoning of *Cort v. Ash* and its progeny "does not properly apply" in this case. *Brief in Opposition* at 17. Calling the Section 13(c) agreement between the Union and Jackson a "federal statutory agreement", the Union asserts that all such contracts must be enforceable in *federal* court, simply because such agreements may have been contemplated as *one* means by which Section 13(c) "fair and equitable arrangements" might be made. The Union urges the Court to rely upon a series of cases decided under the Interstate Commerce and Railway Labor Acts, *Norfolk & Western Ry. Co. v. Nemitz*, 404 U.S. 37, 92 S. Ct. 185 (1971), *Brotherhood of Locomotive Engineers v. Chicago & Northwestern Ry. Co.*, 314 F.2d 424 (8th Cir. 1963), and *Internat'l Ass'n of Machinists v. Central Airlines*, 372 U.S. 682, 83 S. Ct. 956 (1963), and upon the Union's tautological statement that a contract is judicially enforceable. *Brief in Opposition* at 10, 18-20. From these "antecedents", the Union would have the Court find that Section 13(c) of UMTA is simply a recasting of Section 5(2)(f) of the Interstate Commerce Act, and that Section 13(c) agreements are identical to orders entered by a "system board of adjustment" created by agreement under Section 204 of the Railway Labor Act, 45 U.S.C. § 184. It implies that the Court should sanction the creation of a body of federal common law by the lower federal courts, to provide substantive rules for decision of disputes about Section 13(c) agreements, where no such rules of decision were enacted or contemplated by Congress.

However, the "fact that a contract is subject to federal regulation does not, in itself, demonstrate that Congress meant all aspects of its performance or non-performance to be governed by federal law rather than by state law applicable to similar contracts in businesses not under federal regulation." *Ivy Broadcasting Co. v. American Tel. & Tel.*, 391 F.2d 486, 490 (2d Cir. 1968). *See also Pan American Petro. Corp. v. Sup. Ct. of Del.*, 366 U.S. 656, 81 S. Ct. 1303 (1961); *Phillips Petro. Co. v. Texaco, Inc.*, 415 U.S. 125, 94 S. Ct. 1002 (1974); and *McFaddin Express, Inc. v. Adley Corp.*, 346 F.2d 424, 426 (2d Cir. 1965), *cert. denied* 382 U.S. 1026 (1966). Indeed, unless the subject matter of a contract which is subject to federal regulation so manifestly calls for national uniformity that a "federal rule of decision is 'necessary to protect uniquely federal interests,' *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426, 84 S. Ct. 923, 939, 11 L. Ed. 2d 804 (1964)," or the "Congress has given the courts the power to develop substantive law, *Wheeldin v. Wheeler*, [373 U.S. 647, 652, 83 S. Ct. 1441, 1445 (1963)]," *Texas Industries, Inc. v. Radcliff Materials*, ___ U.S. ___, 101 S. Ct. 2061, 2067 (1981), the performance and enforcement of a contract is governed by state, not federal law. Such instances are "few and restricted," *id.*, since there is "no general federal common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 822 (1938); *Milwaukee v. Illinois and Michigan*, ___ U.S. ___, 101 S. Ct. 1784, 1791 (1981).

In *Miree v. Dekalb Co., Ga.*, 433 U.S. 25, 97 S. Ct. 2490 (1977), the Court considered and rejected an argument like the one raised by the Union in this case. In *Miree* the heirs of several plane crash victims brought a diversity action against Dekalb County, asserting that the County had breached the terms of a contract, concluded by the County and the Federal Aviation Administration under the terms of the Airport and Airway Development Act of 1970, 49 U.S.C. 1701 *et seq.* The Fifth Circuit Court of Appeals, *en banc*, adopted the plaintiffs' view that they were third party beneficiaries of the contract, and held that since the contract was one concluded "pursuant to authority conferred by federal statute," the federal courts were vested

with jurisdiction to entertain the action since the "necessity of uniformity of decision demands that federal common law, rather than state law, control the contract's interpretation." This Court vacated that judgment, and remanded the case for consideration of the plaintiffs' claims under applicable Georgia law. Finding the litigation to be "among private parties" and that "no substantial rights or duties of the United States hinge on its outcome", the Court declined to sanction the creation of federal common law to decide the case. The Court continued its reasoning as follows:

> Nor is the fact that the United States has a substantial interest in regulating aircraft travel and promoting air travel safety sufficient, given the narrow question before us, to call into play the rule of *Clearfield Trust.* In *Wallis v. Pan American Petroleum Corporation,* 384 U.S. 63, 68, 86 S. Ct. 1301, 1304, 16 L. Ed. 2d 369 (1966), the Court discussed the nature of a federal interest sufficient to bring forth the application of federal common law:
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> > 'In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a *significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown.* It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress.' (Emphasis added.)

Miree v. Dekalb Co., Ga., 433 U.S. at 31-33, 97 S. Ct. at 2495 (footnote omitted).

Similarly, in this case, the fact that the United States may have a substantial interest in the betterment of urban mass transportation is not sufficient to call into play the rule of *Clearfield Trust Co. v. United States,* 318

U.S. 363, 63 S. Ct. 573 (1943), and permit the creation of federal common law. No conflict between any federal policy or interest and the use of state law to interpret municipal transit labor agreements, including both collective bargaining and Section 13(c) agreements, has been "specifically shown." Rather, the legislative history of UMTA clearly discloses the congressional intention *not* to preempt or supersede state law, and the congressional understanding of the uniquely local nature of municipal transit labor relations. Hence, while it may be that Congress could enact "a complete code of law" governing municipal transit labor relations,[50] or that it could grant the federal courts authorization to formulate substantive rules of decision,[51] it did not do so in UMTA. *Compare* UMTA Section 13(c), 49 U.S.C. § 13(c), *with* Labor-Management Relations Act § 301(a), 29 U.S.C. § 185(a).

This case is, therefore, distinguishable from the Court's decisions in *Machinists v. Central Airlines* and *Norfolk & Western Ry. Co. v. Nemitz*, and from the Eighth Circuit's decision in *Brotherhood of Locomotive Engineers v. Chicago & Northwestern*. The decision in *Central Airlines*, at least, "can be explained historically." *Cannon v. University of Chicago*, 441 U.S. at 692 n.13, 99 S. Ct. at 1955 n.13. In *Central Airlines* the Court considered the enforceability of an order entered by a "system board of adjustment", created by agreement of the parties in compliance with § 204 of the Railway Labor Act, 45 U.S.C. § 184. Noting the "steady congressional intent to move toward a reliable and efficient system for the settlement of grievances" through "compulsory system, group, or regional boards", the Court found that Congress intended the "statutory command", which it set forth in the Railway Labor Act, "to be legally enforceable in the courts". 372 U.S. at 690, 83 S. Ct. at 961 (emphasis supplied).

Rejecting *Central Airlines'* contention that the complaint did not disclose a federally created cause of action,

[50] *Miree v. Dekalb Co., Ga.*, 433 U.S. at 32, 97 S. Ct. at 2495.

[51] *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 77 S. Ct. 912 (1957).

the Court found that the suit was not one "involving an aspect of a federal law which is only collateral or remote or a case where state and federal laws are so blended as to present a serious question of the scope of the 'arising under' provision of §§ 1331 and 1337", and held that "the complaint in this case for jurisdictional purposes, presented a substantial claim having its source in and arising under the Railway Labor Act . . .," *Central Airlines*, 372 U.S. at 684, 695-96, 83 S. Ct. at 958, 963-64. Consequently, in *Central Airlines*, the Court inferred a private "right to recover", or remedy, from the terms of the Act, to enforce *orders* entered by Railway Labor Act boards of adjustment. In doing so, the Court "explicitly followed the lead of various earlier cases in which it had implied causes of actions under various sections of the Railway Labor Act, albeit where the statutory provisions more explicitly identified a class of benefited persons." *Cannon*, 441 U.S. at 692-93 n.13, 99 S. Ct. at 1955 n.13.

Unlike the situation in *Central Airlines*, no system of dispute resolution has been prescribed by Congress to govern the parties' relations in this case. Nor does UMTA contain any suggestion that "the needs of the subject matter manifestly call for uniformity." 372 U.S. at 691-692. Rather, UMTA leaves "state and federal laws . . . so blended as to present a serious question of the scope of the arising-under provision of § 1331 or § 1337," *Id.* at 695-96.

At issue in *Nemitz* was a claim for damages incurred by reason of a railroad's alleged violation of an Interstate Commerce Commission *order*, granting the railroad authority to purchase part of the Penn Central's Toledo Division, and including protective arrangements under the provisions of 49 U.S.C. § 5(2). Pursuant to its mandate under § 5(2)(f), the Commission imposed certain conditions upon the railroad for protection of employees who might be adversely affected by the purchase. Although the Court addressed the substantive question raised by the parties,[52]

[52] The precise question considered by the Court in *Nemitz* was whether the final sentence of § 5(2)(f) of the Interstate Commerce Act permitted the parties affected by an ICC

it did not, as the Union has suggested, consider the jurisdictional contentions made in the district court[53] and in the court of appeals.[54]

It is clear from the lower court opinions in *Nemitz*, that the plaintiffs described their cause of action as one to enforce the terms of an ICC order, over which the federal courts were expressly granted jurisdiction under 28 U.S.C. § 1336 and 49 U.S.C. §§ 9 and 16(12). No comparable jurisdictional grants or remedial provisions may be found in the terms of UMTA. Unlike the Interstate Commerce Act, which created a comprehensive regulatory scheme, UMTA did not confer upon any agency "exclusive and plenary" authority, or preempt contrary state and municipal law.[55] Nor are the Union's purported rights in this case grounded in any "order" incorporating the terms of the 13(c) agreement it seeks to enforce.[56] Rather, as District Judge Wellford correctly found in this case, the Union's rights, if any, are only contained in a common-law contract, the Section 13(c) agreement itself, which, in the absence of diversity, may be enforced only in state court.[57]

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consolidation order to supersede the labor protection provisions, established as a condition in the order, by entering subsequently into a collective agreement changing the terms of such protective provisions. Answering that question, the Court held that an agreement entered into by the railroad and the plaintiffs' Union after the entry of an ICC order could not "abrogate" the plaintiffs' rights to the compensation established in the labor protection provisions of the *order*.

[53] *Nemitz v. Norfolk & Western Ry. Co.*, 287 F. Supp. 221 (N.D. Ohio 1968) (jurisdiction); 309 F. Supp. 575 (N.D. Ohio 1969) (merits).

[54] *Nemitz v. Norfolk & Western Ry. Co.*, 436 F.2d 841 (6th Cir. 1971).

[55] *See* 49 U.S.C. § 5(11).

[56] *See McGlaughlin v. Penn Central Co.*, 384 F. Supp. 179, 182 (S.D.N.Y. 1974).

[57] Interestingly, in *Nemitz*, the Court stated that the protections afforded by § 5(2)(f) of the Interstate Commerce Act, to which the Union mistakenly draws an analogy, need not be included in any collective agreement, "mandatory" or otherwise, but may be provided by the Interstate Commerce Commission itself, in an order which it issues to govern the relationship

In *Locomotive Engineers* the Eighth Circuit considered a union's complaint to require arbitration under the terms of a stipulation concluded by the union and a railroad in order to gain the ICC's approval of the railroad's purchase of the assets of another railorad. Contesting the applicability of the stipulation, the railroad insisted upon arbitration under the Railway Labor Act, 45 U.S.C. § 156. Hence, the issue in *Locomotive Engineers* was not one of interpretation of collective agreements, but rather a question of "the interpretation and effect of Section 5(11) of the Interstate Commerce Act on an agreement for the protection of employees approved by the Interstate Commerce Commission under Section 5(2) of the Act," and made part of the ICC's order authorizing the purchase of one railroad by another. *Id.* at 426, 428. Only choosing between the application of the Interstate Commerce and Railway Labor Acts, the *Locomotive Engineers* court noted the "plain language of § 5(11) conferring exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal [and state] law." *Id.* at 431-32, 429. Expressly limiting its decision to the facts of the case, *id.* at 434, the court reviewed the legislative history of the Interstate Commerce Act, and found that application of the Railway Labor Act would defeat the purpose Congress expressed in the Interstate Commerce Act. *Id.* at 431.

The Interstate Commerce Act contains express remedial provisions, conferring upon private parties a right of action to enforce any ICC order, including an order such as the one governing the parties' relations in *Locomotive Engineers*, 49 U.S.C. § 16(12). It was not strictly necessary, therefore, for the *Locomotive Engineers* court to imply such a remedy. *See also* 28 U.S.C. § 1336. Nonetheless, the considerations applied by other courts in finding such an

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between an interstate carrier, whose merger with another carrier the order approves. 404 U.S. at 42. Hence, not even § 5(2)(f) of the Interstate Commerce Act, strictly construed, "mandates" any agreement.

implied remedy, at least those considerations applied prior to *Cort v. Ash*, may all be found in *Locomotive Engineers*.[58]

More closely analogous to § 13(c) of the Urban Mass Transportation Act is § 565 of the Amtrak Act,[59] conditioning the making of contracts between the National Railroad Passenger Corporation and private railroads[60] upon certification by the Secretary of Labor that "fair and equitable arrangements" have been made to protect the interests of employees" affected by such contracts. Congress clearly demonstrated, in enacting the Railway Passenger Service Act of 1970,[61] that it well knew how to create a remedy, enforceable in federal court, if it so desired. *See* 45 U.S.C. § 547.[62] Similarly, in UMTA, when Congress intended to create a remedy for the breach of one of its terms, it did so expressly, by conferring upon the Attorney General authority to commence a civil action in federal court. *See* 49

[58] First, the Court in *Locomotive Engineers* found that the ICC order at issue in the case, as well as various provisions of the Interstate Commerce Act, contemplated protection of railway employees adversely affected by the merger which the ICC ordered authorized. *Id.* at 427. Second, while not expressly addressing the intention of Congress to create or deny a private federal remedy, such a remedy would be consistent with the purposes expressed by Congress in the Act. *Id.* at 430-432. And, finally, because of the express preemption of contrary State law contained in § 5(11) of the Act, the Court might well have found that private actions, such as the one before it, were not "traditionally relegated to state law," or involving of a matter "basically the concern of the states." It was appropriate in *Locomotive Engineers*, therefore, to infer a cause of action based solely on federal law.

[59] 45 U.S.C. § 565.

[60] 45 U.S.C. § 561(a).

[61] 45 U.S.C. § § 501 *et seq.*

[62] Section 547 provides in pertinent part that: "If the Corporation or any railroad enages in or adheres to any action, practice or policy instituted with . . . this chapter . . . the district court of the United States . . . shall have jurisdiction . . . upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby . . . to grant such equitable relief as may be necessary . . ." 45 U.S.C. § 547(a).

U.S.C. § 1615. Moreover, when Congress sought to preempt contrary state or municipal law in the Railway Passenger Service Act, it expressed its intentions unambiguously. *See* 45 U.S.C. §§ 564 and 642. No such expression of its intention is contained in UMTA.

Reviewing the purposes of the Amtrak Act, several courts have construed narrowly § 547 of the Act, and have declined exercise of jurisdiction of several complaints seeking review[63] or enforcement[64] of labor protection agreements concluded by Amtrak with other railroads, under the provision of Section 565. *Cf. Nat. R.R. Passenger Corp. v. Passenger Ass'n*, 414 U.S. 453, 94 S. Ct. 690 (1974).

The Congress failed, in the Urban Mass Transportation Act, to provide explicitly even so limited a remedy as it provided in Section 547 of the Amtrak Act. Clearly, though it had the opportunity on several occasions to do so, the Congress also failed explicitly to establish any remedies, or bases for assumption of federal jurisdiction, similar to those contained in the Railway Passenger Service Act, the Railway Labor Act, and the Interstate Commerce Act.[65] There is no reason in this case, without

[63] *See Congress of Ry. Unions v. Hodgson*, 326 F. Supp. 68 (D.D.C. 1971).

[64] *See, e.g., McGlaughlin*, 384 F. Supp. at 182, 183, holding that the protective arrangement made between Penn Central and the Nat. R.R. Passenger Corp., and made part of the Secretary of Labor's certification, is not a "labor agreement", over the enforcement of which the federal courts might have subject matter jurisdiction under 45 U.S.C. § 547. *See also Tribbett v. Chi. Union Station Co.*, 352 F. Supp. 8 (N.D. Ill. 1972), finding that a similar arrangement made between the Corporation and the plaintiffs' former employers, is "not a labor or 'collective bargaining agreement' between an employer and his employees or their representatives", over the enforcement of which the court might have subject matter jurisdiction under the Railway Labor Act, 45 U.S.C. § 153, and that "the Railway Labor Act is not applicable because the instant action arose under a private contract involving two corporations", and not under any federal statute, 352 F. Supp. at 11-12.

[65] *See* 49 U.S.C. §§ 9, 16(12), and 28 U.S.C. § 1336.

more adequate demonstration of the Congress' intention, to assume "that Congress meant all aspects of [the] performance or nonperformance [of Section 13(c) agreements] to be governed by law fashioned by federal courts rather than by state law. . . ." *McFaddin Express, Inc. v. Adley Corp.*, 346 F.2d at 427.

In sum, the cases relied upon by the Union, and by the Sixth Circuit in this case, do not support the assumption of federal jurisdiction over Section 13(c) agreements or municipal transit labor contracts, or sanction the formation of a body of federal common law to govern the interpretation of such agreements. Nor should those cases permit the Court, or the lower federal courts to avoid the reasoned analysis of *Cort v. Ash* and its progeny. Since this case involves no federal common law or implied statutory cause of action, this case, as Judge Wellford properly found, should be dismissed, and the Union should be remitted to the courts of the State of Tennessee, to seek its readily available remedies. *Local Div. 1285, etc. v. Jackson Transit Auth.*, 447 F. Supp. at 94-95.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that the Court reverse the judgment of the United States Court of Appeals for the Sixth Circuit in this case, and order that the case be remanded to the Circuit Court, with instructions that the District Court's judgment, dismissing the Union's action for lack of subject matter jurisdiction, be affirmed.

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Respondent's Brief

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No. 81-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

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Petitioners,

v.

LOCAL DIVISION 1285,
AMALGAMATED TRANSIT UNION, AFL-CIO-CLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether § 13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 1609(c), mandates that recipients of federal transit grants must conclude binding labor protective agreements, enforceable in contract actions in federal court.

(2) Whether § 13(c)(2) of the Urban Mass Transportation Act, 49 U.S.C. § 1609(c), which continues collective bargaining rights under the federally financed public takeover of a formerly private transit system, mandates the preservation of collective bargaining agreements, enforceable in federal courts.

(3) Whether Petitioners' actions, under color of state law, depriving Respondent of its federally mandated rights under § 13(c) of the Urban Mass Transportation Act to binding labor protective agreements and to continued collective bargaining agreements, gave rise to a claim for which a remedy exists under 42 U.S.C. § 1983 or implied from the Urban Mass Transportation Act itself.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	(i)
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	7
ARGUMENT	8
A. The Federal Obligations in § 13(c) Are Derived From the Plain Language of the Statute	8
B. The Legislative History of § 13(c)	10
C. Under the Plain Language of § 13(c) and Its Legislative History, § 13(c) Rights Are Enforceable In Federal Court	24
D. Even Without the § 13(c) Agreement and the Collective Bargaining Agreement Respondent Would State a Claim for Enforcement of the Act	33
CONCLUSION	37

TABLE OF AUTHORITIES

CASES:

American Surety Co. v. Schulz, 237 U.S. 159 (1914) 27
Cannon v. University of Chicago, 441 U.S. 677 (1979) 34
Cort v. Ash, 422 U.S. 66 (1975) 34
Dade County v. Amalgamated, 157 So. 2d 176 (Fla. App. 1963) 11
Deitrick v. Greaney, 309 U.S. 190 (1939) 29
Dowd Box Co. v. Courtney, 368 U.S. 502 33
Edison Co. v. Labor Board, 305 U.S. 197 (1938) 8
Florida East Coast Ry. v. Jacksonville Terminal Co., 328 F.2d 720 (5th Cir.), cert. denied, 379 U.S. 830 (1964) 28
Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275 (1957) 22
Maine v. Thiboutot, 448 U.S. 1 (1980) 35, 36
Machinists v. Central Airlines, 372 U.S. 682 (1963) 7, 27, 28, 30, 31, 32
Machinists v. Central Airlines, 295 F.2d 209 (5th Cir. 1961) 28
Middlesex Co. Sewerage Auth. v. National Sea Clammers Ass'n, —— U.S. ——, 101 S.Ct. 2615 (1981) 36
New York Dept. of Social Services v. Dublino, 413 U.S. 405 (1973) 36
Norfolk & Western Co. v. Nemitz, 404 U.S. 37 (1971) 27
Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981) 32, 35
Perrin v. United States, 444 U.S. 37 (1979) 8
Porter Co. v. NLRB, 397 U.S. 99 (1970) 23
Texas Indus., Inc. v. Radcliff Materials, Inc., —— U.S. ——, 101 S.Ct. 2061 (1981) 34
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) 8, 24, 34
Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 33, 34

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS: Page

Interstate Commerce Act, 49 U.S.C. § 5(2)(f) 13, 25, 26, 35
Investment Advisors Act § 215, 15 U.S.C. § 80b-15 .. 33
Labor Management Relations Act § 301, 29 U.S.C. § 185 ..... 2, 8, 9
National Labor Relations Act, as amended, 49 Stat. 449, 61 Stat. 136, 29 U.S.C. § 151, *et seq.* 1
Railway Labor Act § 204, 45 U.S.C. § 184 ..... 28, 29
Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601, *et seq.* ..... *passim*
§ 3(e)(4) 2, 3, 4
§ 13(c) ..... *passim*
§ 13(c)(1) 2, 32
§ 13(c)(2) 2, 3, 24, 25, 32
§ 13(c)(3) 2, 3
§ 13(c)(4) 2, 3
§ 13(c)(5) 2, 3
28 U.S.C. § 1331 ..... 5, 24
§ 1337 ..... 5, 24
42 U.S.C. § 601 ..... 35, 36
§ 602(a)(7) 35
§ 604(a) 36
§ 1983 ..... 8, 34, 35, 36
29 C.F.R. § 215 ..... 3, 27

LEGISLATIVE MATERIALS:

H.R. Rep. No. 204, 88th Cong., 1st Sess. (1963) 13
S. Rep. No. 82, 88th Cong., 1st Sess. (1963) 13, 19
109 Cong. Rec. 13, 14, 15, 16, 18, 19, 20, 21, 22
110 Cong. Rec. 13, 18
Hearings on H.R. 3881, before House Comm. on Banking & Currency, 88th Cong., 1st Sess. (1963) 11, 17, 26
Hearings on S. 6, Subcomm. on Housing of the Senate Comm. on Banking & Currency, 88th Cong., 1st Sess. (1963) 11, 12, 17, 26

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---

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Division 1285, Amalgamated Transit Union, AFL-CIO-CLC (hereinafter the "Union"), is an unincorporated labor organization representing transit employees (Joint Appendix, p. 6a) (hereinafter, "Jt. App."). From 1943 through 1966, a private transit company whose labor relations were subject to the National Labor Relations Act, as amended, 49 Stat. 449, 61 Stat. 136, 29 U.S.C. § 151 *et seq.* ("NLRA"), operated in Jackson, Tennessee, and the Union was the employees' chosen collective bargaining

representative. (Jt. App., pp. 7a-8a.) As such, the Union had been a party to a series of collective bargaining agreements (Jt. App., p. 8a) enforceable, of course, in federal court under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 (LMRA). The term of the last of these collective bargaining agreements was 1966 to 1969 (Jt. App., p. 21a).

In 1966, the City of Jackson created the Jackson Transit Authority as a public entity to supersede the private transit company and to provide the identical transit service that had previously been privately provided. (Jt. App., p. 6a.) (The City of Jackson and the Jackson Transit Authority are hereinafter referred to as "Jackson.") Immediately thereafter, Jackson, in order to purchase the capital equipment necessary to public provision of transit services, applied to the United States Urban Mass Transportation Administration for a federal grant under the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601, *et seq.* (hereinafter "UMTA.") (Jt. App., p. 7a.)

Section 13(c) of UMTA requires a local public body applying for federal transit money to take over a formerly private company to "preserv[e] rights, privileges and benefits * * * under existing collective bargaining agreements * * *" (§ 13(c)(1)); "continu[e] existing bargaining rights" (§ 13(c)(2)); "protec[t] employees against a worsening of their [employment] position" (§ 13(c)(3)); and assure employees of employment on successor systems (§ 13(c)(4)), and of paid retraining programs (§ 13(c)(5)).[1] Section 3(e)(4) of UMTA in

[1] In full, § 13(c) requires:

> It shall be a condition of any assistance under this chapter that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges and

turn requires that in cases like the instant one, where the federal funds will finance a public takeover, the Secretary of Labor must certify to the Secretary of Transportation that the grant applicant is in compliance with the requirements of § 13(c), 49 U.S.C. § 1602(e)(4). Where the grant application concerns a private company whose employees are represented by a union, the Secretary of Labor, to effectuate the Act, notifies that union of the application and advises the applicant and the union to meet to negotiate a labor protection agreement (hereinafter a § 13(c) agreement). 29 C.F.R. § 215. The Secretary of Labor reviews the agreement reached and if he concludes that the agreement effectuates § 13(c), so certifies to the Secretary of Transportation. *Id.*

Therefore, in Jackson, as in all situations involving UMTA grant applicants where the employees are represented by a union, Jackson and the Union met to negotiate an agreement, incorporating the minimum statutory requirements set out in § 13(c) and setting forth the specifics of the overall fair and equitable arrangement that Section provides. On July 26, 1966, Jackson and the Union concluded and signed a § 13(c) agreement (Jt. App., p. 6a). That agreement states specifically that:

> The collective bargaining rights of employees of the system represented by the Union, including the right

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benefits (including continuation of pension rights and benefits) under existing collective bargaining agreeemnts or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to § 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

> to arbitrate any labor dispute, as provided in applicable laws, policies and/or existing collective bargaining agreements, shall be preserved and continued. The Authority agrees that it will bargain collectively with the Union or otherwise arrange for the continuation of collective bargaining, and that it will enter into agreements with the Union or arrange for such agreements to be entered into, relative to all subjects of collective bargaining which are or may be proper subjects of collective bargaining with a private employer. [Jt. App., pp. 17a-18a.]

The § 13(c) Agreement also provides that:

> . . . this agreement shall not merge into the contract of assistance, but shall be independently binding and enforceable by and upon the parties hereto, in accordance with its terms; nor shall the collective bargaining agreement between the parties merge into this agreement, but each shall be independently binding and enforceable by and upon the parties hereto, in accordance with its terms. [Jt. App., p. 20a.]

The Secretary of Labor then determined that this § 13(c) Agreement embodied the necessary statutory requirements and certified to the Secretary of Transportation, under § 3(e)(4), that, through the vehicle of the § 13(c) Agreement, employees "will receive the protections required by § 13(c) of the Act." (Jt. App., p. 96a). Jackson received its federal funds for the public takeover, and the public operation of transit in the city began (Jt. App., p. 7a).

From 1966 until 1975, Jackson continued to negotiate with the Union with the result that the basic preexisting collective bargaining agreement was modified several times (Jt. App., p. 8a).[2] In 1975, a few months after

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[2] This collective bargaining agreement, which is the subject of this lawsuit, is a garden variety collective bargaining agreement, providing for Union Recognition, Probationary Period, Leaves of Absence, Seniority, Vacations, Wages, Uniforms, Sick Leave. (Jt. App., pp. 21a-30a).

conclusion of a collective bargaining agreement for the period 1975-1978, Jackson wrote to the Respondent, unilaterally declaring that the collective bargaining agreement was "without effect".[3] Jackson then refused to abide by the collective bargaining agreement and unilaterally changed the conditions of employment stated therein (Jt. App., p. 8a). The United States Secretary of Labor refused to determine whether Jackson had breached its labor protective agreement, which, as he had certified, extended the employees the protections required by the Act. (App., pp. 79a-81a.)

Respondent thereupon brought suit in the United States District Court for the Western District of Tennessee alleging that Jackson had "breached the current collective bargaining agreement and the § 13(c) Agreement" by "unilaterally declaring to be null and void the current collective bargaining agreement" and "demanding that Division 1285 enter into new collective bargaining sessions for the purpose of altering the wages and benefits of employees set forth in the current collective bargaining agreement." (Jt. App., p. 8a.) Respondent also sued the Secretaries of Labor and Transportation. Respondent alleged that: (1) the Secretary of Labor should determine that Jackson was no longer in compliance with the requirements of § 13(c) and compel compliance with those requirements; and (2) upon finding of a violation by the Secretary of Labor, the Secretary of Transportation should compel compliance with the § 13(c) requirements. (Jt. App., pp. 9a-10a.)

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[3] Jackson contended that the collective bargaining agreement—the fourth one negotiated by the transit system manager since 1966—was "personal" to the manager, who had resigned. Second, Jackson contended that the manager had failed to obtain proper authority for the collective bargaining agreements from the Board of Commissioners (Jt. App., pp. 8a, 45a-46a).

The secretaries both moved successfully to dismiss the Complaint against them. The Secretary of Labor contended that he had completed all of his statutory duties when he reviewed the § 13(c) Agreement signed by Jackson and the Union and ascertained that, through enforcement of that agreement, employees will receive "the protections required by § 13(c) of the Act. No further action is mandated on the part of the Secretary of Labor. The agreement assures that affected employees are protected." (Jt. App., p. 96a.) The Secretary of Labor contended that he was a wholly unnecessary and inappropriate party to any action for enforcement of the § 13(c) Agreement or the collective bargaining agreement, to which he is not a party. (Jt. App., p. 93a.) Regarding his obligation under the Act, the Secretary asserted that "the fair and equitable arrangements required by the UMTA were made when JTA and the Union signed the (§ 13(c)) agreement set out as Exhibit "C" to the Complaint" (Jt. App., p. 92a) and that the Union should enforce the Act by using the self-enforcement mechanisms reflected in the § 13(c) Agreement. (Jt. App., pp. 93a-95a.)

With regard to the Union's claims based on the collective bargaining agreement and the § 13(c) Agreement, the district court held that the Union's federal rights were specifically preserved by the § 13(c) Agreement, to be enforced through private court actions, but *not* in a federal court.

The court of appeals affirmed the dismissal of the claim against the Secretaries, but reversed the dismissal of the Union's claim against Jackson. The court held that UMTA created a substantive federal right to continued collective bargaining after a public takeover and "h[e]ld that the union is entitled to pursue its claim [based on that right] in federal court." (Pet. App., p. 13a.)

SUMMARY OF ARGUMENT

Section 13(c) of the Urban Mass Transportation Act requires state and local authorities that seek federal monies for a public takeover of a private urban mass transit company to "continu[e]" existing employee "collective bargaining rights." Section 13(c) was proposed, considered and enacted in order to ensure continuation of federal collective bargaining rights in programs financed by federal transit funds. Such rights include binding collective bargaining agreements, enforceable in federal court. Pursuant to that requirement, Jackson concluded a labor protective agreement with the Union (§ 13(c) Agreement) stating expressly that it would continue collective bargaining and enter into enforceable collective bargaining agreements. At the time here at issue, Jackson and the Union were parties to both a § 13(c) Agreement and a collective bargaining agreement.

The court of appeals here properly found federal subject matter jurisdiction to enforce these rights. First, the federal statute creates enforceable federal obligations between the parties. The statutory language so provides and the legislative history confirms that Congress intended to create binding federal obligations as a condition for receipt of federal funds. Jackson's arguments here, if accepted, would have the effect of securing by judicial action a result that UMTA's legislative opponents failed to obtain in Congress, despite repeated efforts.

Second, the legislative history of the Act, the administrative practice since its passage, and the uniform conduct of all parties involved, all reflect that, in enacting UMTA, Congress meant to create contractual relationships, just like the § 13(c) Agreement here, binding and enforceable by the parties. Congress having chosen a binding contract as the vehicle for effectuating the mandatory federal statutory rights, under *Machinists* v. *Central Airlines*, 372 U.S. 682 (1963), federal court enforcement of the contract follows.

Finally, the Civil Rights Act of 1871, 42 U.S.C. § 1983, provides a right of action against Jackson for depriving the Union of the specific rights secured to it by § 13(c) of UMTA.

ARGUMENT

A. *The Federal Obligations in § 13(c) Are Derived From The Plain Language of The Statute*

"A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). Therefore, in this instance "we look to the ordinary meaning of the term ['collective bargaining rights'] at the time Congress enacted [UMTA] in 196[4]." (*Perrin*, *id.* at 42.) Because our contention is that § 13(c) continues the status of labor agreements as federal contracts enforceable in federal court, we confine our review of the applicable law in 1964 to that aspect of the then existing national labor policy.

As this Court observed in *Edison Co.* v. *Labor Board*, 305 U.S. 197, 236, the National Labor Relations Act "contemplates the making [by employers] of contracts with labor organizations. That is the manifest objective in providing for collective bargaining." Nevertheless, it was not until 1947, through the enactment of § 301 of the Labor Management Relations Act, that the statutory scheme was perfected by making such contracts enforceable as a matter of federal law in federal court. The reason for Congress' determination to take that step is set out in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 452-454 (1956):

> * * * [T]he Conference Report [on the LMRA] stated, "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42.
>
> Both the Senate and the House took pains to provide for "the usual processes of the law" by

> provisions which were the substantial equivalent of § 301(a) in its present form. Both the Senate Report and the House Report indicate a primary concern that unions as well as employees should be bound to collective bargaining contracts. But there was also a broader concern—a concern with a procedure for making such agreements enforceable in the courts by either party. At one point the Senate Report, *supra*, p. 15, states, "We feel that the aggrieved party should also have a right of action in the Federal courts. Such a policy is completely in accord with the purpose of the Wagner Act which the Supreme Court declared was 'to compel employers to bargain collectively with their employees to the end that an employment contract, binding on both parties, should be made . . . .'" * * * *
>
> Thus collective bargaining contracts were made "equally binding and enforceable on both parties." [Senate Report *supra*], p. 15. As stated in the House Report, *supra*, p. 6, the new provision "makes labor organizations equally responsible with employers for contract violations and provides for suit by either against the other in the United States district courts." To repeat, the Senate Report, *supra*, p. 17, summed up the philosophy of § 301 as follows: "Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace."

Thus, the right of the parties to enforce collective bargaining agreements in federal court is a centerpiece of the national labor policy's peacekeeping scheme. It is therefore wholly improbable that § 13(c)'s requirement that "collective bargaining rights" are to be "continue[d]" can be read to mean anything other than that the principle of § 301 continues in force when federal funds are used to transform a private transit company into a public transit authority. The purpose and legislative history of § 13(c), as we now show, confirm this conclusion.

B. *The Legislative History of § 13(c)*

The central theme of the legislative history of § 13(c) is that, as a mandatory condition of federal funding for public takeover of private transportation companies, Congress intended to require a state or local government to bind itself to maintain the status quo of labor relations. Congress specifically intended to preserve existing collective bargaining agreements so that they could not be unilaterally set aside or abrogated, and to preserve the federal scheme of collective bargaining, which included—as Congress well knew—federal enforcement of collective bargaining agreements. Congress repeatedly rejected attempts to provide that state law, rather than federal law, would define the § 13(c) obligations of a public authority that had accepted federal funds under UMTA.

1. When, in the early 1960's, Congress began considering whether to make available large scale federal assistance for urban mass transit, the proposals did not provide protection for employee rights. The motive force of the effort that led to § 13(c) was a public takeover of a private transit company in Dade County, Florida. Senator Tower, the leading opponent of providing protection for employee rights in UMTA, correctly described the impetus for § 13(c):

> Labor's fears did not exist last year or the year before. They supported and endorsed this legislation at that time, but because of the public acquisition of a private transit system, or more properly systems, in Dade County, Fla., problems that labor might face under this legislation were suddenly brought to light. [109 Cong. Rec. 5321.]

The problems to which Senator Tower referred were the following. A private company had long provided local mass transit in Dade County, Florida. A local division of what is now the Amalgamated Transit Union had long represented that company's employees. In 1962, Dade

County bought out the private transit company. When the transit union local there sought to continue representing the employees, Dade County sought and successfully obtained rulings from the Florida state courts that: (1) Florida law completely prohibited the County from bargaining collectively; (2) Florida law allowed the public employer to abrogate the existing collective bargaining agreement, and (3) Florida law allowed the new publicly financed owner to refuse to employ any of the employees of the private company. See *Dade County* v. *Amalgamated*, 157 So. 2d 176 (Fla. App. 1963); Hearings on H.R. 3881, Before House Comm. on Banking and Currency, 88th Cong., 1st Sess. (1963), p. 487, 625 (hereinafter, "House Hearings"); Hearings on S. 6, Subcommittee on Housing of the Senate Comm. on Banking and Currency, 88th Cong., 1st Sess. (1963), p. 318, 319 (hereinafter, "Sen. Hearings"); 109 Cong. Rec. 5321. Union representation of the transit workers in Dade County was destroyed.

Congress accurately perceived that offering UMTA funds to the states for public transportation would encourage other local authorities to do what Dade County had done. In order to avoid the use of federal funds to finance the destruction of employee rights, representatives both of organized labor and of the Administration sought protective measures from the Senate and House Committees that were considering UMTA. Andrew Biemiller, Legislative Director of the AFL-CIO, testified:

> MR. BIEMILLER. We have seen in the Dade County situation not only the right to strike but the right to bargain go down the drain. This is the problem, among others, or I mean this is one of the specifics of the Dade County problem which is on the minds of every labor leader in America. [Sen. Hearings, P. 319].

See also Sen. Hearings, pp. 308, 322-23 (proposals), 314, 318; House Hearings, pp. 476, 494-95 (proposals) 491, 624. Bernard Cushman, General Counsel of the Amalgamated Transit Union, said:

> Both S. 6 and S. 917 provide for Federal financial assistance for the acquisition of existing private transit systems. In some States, when a private operation has been acquired by the State or a political subdivision of the State, the public body has taken the position that it is legally disqualified from entering into collective bargaining with the collective bargaining agent of the employees and also from entering into arbitration agreements with such a collective bargaining agent, even where, as is usually the case in our organization, the employees have been for many years represented by the union under a system of collective bargaining and with provision in the collective bargaining agreement for arbitration of unsettled disputes. Dade County, Fla., offers a vivid illustration of a public agency which has refused to bargain collectively despite a situation in which collective bargaining with one of our local divisions was in existence when the county purported to take over the private operation. While this situation is in litigation, it is illustrative of a type of problem which might well be expected to be encountered in some States. [Sen. Hearings, p. 325.]

The Senate Committee responded to the pleas for protection by including a provision—§ 10(c) of the Committee bill—reading as follows:

> "(c) It shall be a condition of the granting of any assistance or the financing of any project under this Act that fair and equitable arrangements are made, as determined by the Administrator after consultation with and the concurrence of the Secretary of Labor, to protect the interests of employees affected by such assistance or financing. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements; (2) the encouragement of the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their

positions with respect to their employment; (4) priority of employment or reemployment of employees terminated or laid off; and (5) paid training or retraining programs. The contract for the granting of any such assistance shall specify the terms and conditions of such protective arrangements." [109 Cong. Rec. 5287-88.]

Although § 10(c) of the Committee Bill was changed in several respects before the Act was passed,[5] the provisions that became § 13(c) were consistently explained as measures to prevent the use of federal funds to finance repetition of the Dade County scenario and instead to preserve the status quo of labor relations following public takeover of a private transportation company. *E.g.*, S. Rep. No. 82, 88th Cong., 1st Sess. 12, 28-29 (1963) (hereinafter "Sen. Report"); H.R. Rep. No. 204, 88th Cong., 1st Sess. 15-16 (1963).

The most important change in these provisions was the result of a floor amendment offered by Senator Morse, and adopted by the Senate.[6] The amendment changed the Committee Bill's provision, in subsection (c)(2), for "the encouragement of the continuation of collective bargaining rights" to one that required "such provisions as

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[5] There were three changes, all made as the result of amendments adopted during the floor debates. First, as described fully below, at pages 13-16, a Senate Amendment sponsored by Senator Morse changed subsection (c)(2) to mandate rather than to "encourage" the "continuation of collective bargaining rights." Second, as a result of Senator Morse's amendment, the next to last sentence of § 13(c) referring to § 5(2)(f) of the Interstate Commerce Act was added. 109 Cong. Rec. 5627. Third, as a result of a House amendment sponsored by Rep. Rains, the Secretary of Labor was given entire authority to pass on the adequacy of the labor protection provisions. 110 Cong. Rec. 14976.

[6] A parallel amendment was adopted on the floor of the House. 110 Cong. Rec. 14976. There were several minor differences between the House version of § 13(c) and the Senate version; in urging the Senate to accept the House-passed version, Senator Morse described those differences as technical and inconsequential. 110 Cong. Rec. 15454.

may be necessary for . . . the continuation of collective bargaining in any situation where it now exists." 109 Cong. Rec. 5627, 5685. Senator Morse made it clear that the intent of his amendment was to mandate the continuation of collective bargaining rights, as a matter of federal policy and federal law. He began by outlining his objection to the Committee Bill:

> The danger in the bill as reported is that it could seriously *disrupt collective bargaining*, which has had such a long and successful history in the mass transportation field. Accordingly, the amendment provides protections for the interests of employees who may be affected by the assistance or financing provided under this legislation.
>
> In my judgment we cannot justify, as a matter of public policy, the use of Federal dollars by a local community or a governmental unit thereof to be spent for development of a transit system, the expenditure of *which would result in worsening the present collective bargaining rights of free labor* which operates that transit system. [109 Cong. Rec. 5671 (emphasis added).]

After noting that he would accept perfecting changes, Senator Morse described the limiting principle that he would observe:

> But if any proposed language changes result in the Federal Government surrendering what I believe is *a basic, sound national policy of economic freedom, and I look upon collective bargaining as such a policy*, I shall vote against such a surrender if it is incorporated in the bill. I shall vote against the amendment and the bill. [109 Cong. Rec. 5672 (emphasis added).]

Senator Morse also explained that the purpose of the amendment was to require maintenance of the status quo of labor relations:

> One of the differences between the Senator from Pennsylvania and the Senator from Oregon is that, in my judgment, the committee bill did not provide

> for the status quo of labor relations. If it had provided for the status quo of labor relations, I would not have been offering an amendment. There would not have been vigorous opposition to the bill as it came to the floor on the part of labor. [109 Cong. Rec. 5675.]

In particular, the amendment would avoid the problem posed by the language of the Committee Bill, which would allow a public transit authority to use federal funds for a takeover and then repudiate existing collective bargaining agreements. Senator Morse explained:

> [The Committee] language uses the word "encourages" the maintenance of the status quo, but it does not require it. What does "encourage" mean? It cannot be subjected to a definition that gives any real protection to labor.
>
> * * * *
>
> *Under* [*the Committee's*] *indefinite language, collective bargaining agreements could be ignored or set aside by systems of public ownership.* [109 Cong. Rec. 5675 (emphasis added).]

The amendment, by contrast, would require that a public authority, obtaining federal funds for a takeover, would bind itself to honor the collective bargaining rights of the private company's employees.[7] Senator Morse stated:

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[7] The Senators who opposed Morse's amendment had the same understanding of its effect:

> MR. TOWER [advocating a return to the language in the Committee Bill]: Mr. President, my amendment would merely strike from the Morse amendment the language on what has been referred to as the protective arrangements, and would preserve the language that is in the bill. I am not too happy with the language in the bill as every Senator knows. But I think that the proposed language is infinitely worse. I am particularly concerned about subparagraph 2, relating to a continuation of collective bargaining in any situation in which it now exists, because I believe that the proposed language would fly in the teeth of several state laws. Probably it would make a number

> [I]f the city wished to obtain a loan or a grant under this bill for an acquisition . . . , and *if it proposed to reject the collective bargaining agreement*, it would not be eligible to receive the money. [109 Cong. Rec. 5673 (emphasis added).]

He went on:

> The point I wish to stress in the legislative history is that the successor company stands in exactly the same shoes as the predecessor company, and *whatever was binding upon the predecessor company in regard to the matter of conditions of employment is binding upon the successor company.* The collective bargaining agreement continues until the parties by collective bargaining change the agreement. [109 Cong. Rec. 5673 (emphasis added).]

2. The general course of the Act in its passage through Congress also confirms that the legislative intent was to make the fundamental § 13(c) protections mandatory as a matter of federal law, and not to leave them either to the discretion of federal administrators or to the states and local governments.

The Administration's proposal for employee protection would have left the continuation of collective bar-

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> of States ineligible to qualify for aid under the provisions of the bill.
>
> * * * *
>
> This proposal is not a compromise, Mr. President. This is a capitulation to the demands of trade union leadership, to demands made the condition for supporting this bill. [109 Cong. Rec. 5678-79.]
>
> * * * *
>
> I call the attention of Senators to protective arrangement No. 2. The bill as we now have before us contains the language: "the encouragement of the continuation of collective bargaining rights."
>
> The Morse amendment reads: "the continuation of collective bargaining in any situation where it now exists."
>
> That is an important and significant change. [109 Cong. Rec. 5683.]

gaining rights to the discretion of the Secretary of Labor and the Administrator of Housing and Home Finance. It would have required only such protective provisions "as are found to be appropriate for . . . (b) the prevention of curtailment of collective bargaining rights." House Hearings, at 476; *see also* Senate Hearings, at 308.[8] Secretary of Labor Wirtz, in testimony before the House and Senate committees, which Jackson has relied upon here, stressed that the Administration's proposal would allow the federal officers to exercise discretion in deciding whether to require preservation of collective bargaining as a condition of granting federal funds under UMTA. House Hearings, at 482-83; Senate Hearings, at 314-15; *see* Pet. Br. 25-26, 28. The discretionary element of the Administration's proposal, however, was not enacted; it did not even find its way into a committee bill. The Administration's proposal instead was converted into a requirement mandating the continuation of collective bargaining as a condition for receiving federal funds. First, the respective committees rejected the proposed administrative discretion to decide what protective conditions were "appropriate," instead requiring the imposition of any conditions that were "necessary" to provide

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[8] The full proposal was:

> It shall be a condition of the granting of any assistance or the financing of any project under this act that fair and equitable arrangements are made, as determined by the Administrator after consultation with and the concurrence of the Secretary of Labor, to protect the interests of employees affected by such assistance or financing. Such protective arrangements shall include, without being limited to, *such provisions as are found to be appropriate* for (a) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements; (b) the prevention of curtailment of collective bargaining rights; (c) the protection of individual employees against a worsening of their positions with respect to their employment; (d) priority of employment or reemployment of employees terminated or laid off; and (e) paid training or retraining programs. [Emphasis added.]

the specific labor protections enumerated in the bill.[9] After this change, the Secretary would no longer be free to decide that commitments necessary to secure the substantive employee protections of § 13(c) were not "appropriate" and thus would not be required.

In the second round the Congress strengthened the protections of § 13(c) yet again. While the substantive provisions of that section in the committee bills required only the "encouragement of the continuation of collective bargaining," [10] the Morse amendment, described above, and the similar Rains amendment in the House changed that provision to a mandatory requirement that collective bargaining be continued.[11] The net effect of these two changes from the Administration proposal to the Act was to leave no doubt that whatever was necessary to ensure the continuation of collective bargaining was to be required, as a matter of federal law, as a mandatory condition for federal funding.

Concurrent with these developments—which were progressively strengthening the UMTA labor protections—ran a second strain of legislative history that further underscores the mandatory requirement of collective bargaining as a matter of federal law. At every stage of the bill's consideration, opponents of the labor protective provisions attempted to amend § 13(c) to provide that grantees could be required only to observe such § 13(c) conditions as are "consistent with state law." All were defeated.

First, a subcommittee proposed to insert a provision in the Senate bill while it was still in committee that would require the continuation of collective bargaining

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[9] The Senate Committee's language is quoted above, at page 12. The House Committee version of what became § 13(c) appears at 110 Cong. Rec. 14976.

[10] *Ibid.*

[11] The debates on the Rains amendment appear at 109 Cong. Rec. 14976-85; the section of the House Bill, as amended, is at *id.* 14992.

rights only "to the extent not inconsistent with State or local law." Sen. Report, p. 50; 109 Cong. Rec. 5019. The full committee omitted that qualification from the bill. Sen. Report, p. 50. On the floor of the Senate, two such qualifying amendments were offered and rejected, one immediately after the other, before Senator Morse offered his amendment to strengthen the labor protections. 109 Cong. Rec. 5421, 5422 (first Tower amendment); *id.* 5423, 5582 (second Tower amendment).[12] Then, during the debate on the Morse amendment, Senator Miller proposed to amend Morse's amendment to provide that the federal administrator could impose only protective conditions that were consistent with state law. *Id.* 5684. The Miller amendment was brought to a vote and it too was defeated. *Id.*[13] In the House as well, after the Rains amendment had been adopted, Representative Taft made one last effort to prohibit the federal administrators from requiring as a condition for grant of federal funds any measures that are inconsistent with state law. *Id.* 14979. Taft's amendment was also defeated. *Id.* 14980.

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[12] In addition, immediately before the two Tower amendments, Goldwater had offered an amendment to strike all the specific conditions enumerated in what is now § 13(c), explaining that his purpose was to make certain that the federal granting agencies could not insist on any labor-protective conditions that were not consistent with state law. 109 Cong. Rec. 5414. That amendment also was defeated. *Id.* 5420.

[13] The significance of the fact that the Tower amendments were offered before Morse's amendment was placed before the Senate, is that at that time, the language in the bill still provided only for the "encouragement" of the continuation of collective bargaining rights. Senator Williams, a supporter of the committee bill, asserted that Tower's amendments were unnecessary because "encouragement" would not require collective bargaining in any event. 109 Cong. Rec. 5423. The Miller amendment, however, was offered and debated as a qualification to the Morse amendment; as we show at pages 13-16, above, and at pages 20-22, below, at that stage everyone understood that without the Miller amendment, the Morse language would prohibit the grant of federal funds if state law did not allow compliance with the § 13(c) protective conditions.

It was clearly understood that the string of amendments offered by Tower and Miller and Taft would have required the federal government to provide funds for public takeover of a private transit company, even though the applicable state law would require or allow repetition of the Dade County experience. 109 Cong. Rec. 5421-23, 5684. The very purpose of those amendments was to ensure that the states would be allowed to take the federal funds without being required to honor collective bargaining rights or agreements. For example, Senator Miller explained his amendment by saying:

> It is all very well and good to say that a State does not have to take this aid; that it can go on with an inconsistent provision and not receive aid from the Federal Government. But I do not think that is fair. . . . [109 Cong. Rec. 5684.]

See also, id. 5421 (remarks of Senator Lausche), 5423-24 (remarks of Senator Tower). Senator Javits, a supporter of § 13(c), likewise expressed his understanding that the Tower amendments would require the federal administrators "to go into a state where a right-to-work law or some other law deprives the municipal employees—that is, employees of the transit system—of collective bargaining rights," and to provide federal funds to take over a private transit company "notwithstanding the fact that the municipal transit system workers might be deprived of collective bargaining rights." 109 Cong. Rec. 5422. Senator Javits, along with the other supporters of § 13(c), stated his preference for the approach that was ultimately adopted: not subjecting the labor protective conditions to the dominion of state law, but instead providing that the conditions under which federal funds would be made available and used would be defined by federal law and federal policy. As Senator Javits expressed it:

> [W]e have a balanced scheme. We do not override the [state] law; at the same time, *we do not compel the federal Government to go in where the law is adverse to the interest of labor and labor's own*

> *point of view*, and [we] perhaps also even give encouragement to exempt a situation of this kind where the State desires to get this type of Federal help. [*Id.*; (emphasis added).]

And Senator Morse made clear that under his amendment, if a state was not prepared to comply with the conditions set by the bill and make commitments for the continuation of collective bargaining, "Federal money would not be available because it would be in conflict with the policy of the bill." 109 Cong. Rec. 5684.

Senator Morse conceded that in one respect state law would be allowed to control. He stated that it was not the intent of his amendment to require that states grant public employees the right to strike, but that the issue of public employee strikes would continue to be governed solely by state law. He stated:

> The amendment provides that Federal assistance will not be available under the bill for the purpose of enabling a city to acquire a privately owned transit system except in special instances such as bankruptcy. If there should be such an acquisition in these special cases and if there were a State law which prevented public employees from striking, they could not then strike. *They would then have all their other rights, but not the right to strike.* [109 Cong. Rec. 5672 (emphasis added).]

He continued:

> The public agency would still have the obligation to carry out all the collective-bargaining obligations of the contract; but if state law forbade a strike against a municipality, of course the union would be bound by the State law. [*Id.* 5673.]

But, despite this concession to one important aspect of state law and policy,[14] Senator Morse stoutly persisted in

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[14] Senator Goldwater argued that unless the language of the amendment were changed expressly, it would include the right to strike in those rights that must be maintained in status quo. *Id.* 5673. Senator Morse, however, repeatedly assured the Senate that

the principle that had to be maintained if Dade County situations were to be precluded—that federal policy would require, as a condition of receiving federal funds, that grantees bind themselves to continue to bargain collectively and to enter into enforceable collective bargaining agreements. *E.g.*, 109 Cong. Rec. 5672, 5684. As he explained it:

> It is impossible to satisfy all Senators. The reason why it is impossible to satisfy them all is that we cannot satisfy each instance and protect the Federal policy, because some changes are going to have to be brought about in some of the States to conform to the Federal policy.
>
> I do not think there would be any great wrong done if we simply said to a State, "You do not qualify for this Federal grant." It does not mean they are entitled, as a matter of right, to the Federal grants irrespective of the fact that they are not following a policy that is in conformity with a Federal policy which I think is sound public policy. [*Id.* 5675.]

In denying that § 13(c) of its own force would override state law, while asserting that public transit authorities would be bound—if they accepted federal funds—by the conditions enumerated in § 13(c) and the "arrangements" it would require, Senator Morse was drawing a distinction familiar to every Senator. He was saying that rather than imposing federal regulations on the states involuntarily, his amendment was an exercise of "the power of the Federal Government to impose reasonable conditions on the use of federal funds . . . ." *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 295 (1957).

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the explicit legislative history was sufficient to establish that the Secretary of Labor would not be allowed to insist on maintenance of the right to strike. *Id.* 5672-73. Senator Morse also explicitly noted that, because § 13(c) would not amend the National Labor Relations Act, the enforcement of collective bargaining rights would not rest with the National Labor Relations Board, but rather would derive from the arrangements under § 13(c). 109 Cong. Rec. 5676.

In summary, the legislative history reveals that the over-all purpose of § 13(c) was to prevent the use of federal money to finance a recurrence of what had happened in Dade County. An essential element of the means that Congress used for this purpose was the continuation of collective bargaining rights following public takeover under UMTA. The collective bargaining rights that were thus preserved had to include not only the right to negotiate contracts but also the right to enforce them as a matter of federal law, because Congress had long before made the judgment that federal enforcement of collective bargaining agreements is an essential part of the scheme of federal collective bargaining rights. Any idea that these rights would be enforced, not by private actions in federal court, but by relying on federal agencies to withhold grant funds is thus inconsistent with both the legislative history of § 13(c) and with the federal labor policy's fundamental philosophy of keeping the government out of the collective bargaining relationship. *See Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).

3. Jackson's argument would nullify what Congress sought to achieve in § 13(c). Instead of a regime in which federal policy and federal law define and enforce the statutory conditions on which federal funds are granted and used, Jackson would assign those questions to state law and state adjudication. The result would be the same as if Senator Tower and his allies had succeeded in their repeated efforts to amend § 13(c) to include the language, "to the extent not inconsistent with state law." It would mean that a public transit authority would be required by § 13(c) to make promises in order to obtain federal funds, but that once the money had been spent, the transit authority would be required to live up to its promises only if, and to the extent that, state law permitted.

It is also clear that nothing would be left of the congressional intent if the § 13(c) provision requiring the continuation of collective bargaining rights were not con-

strued to carry with it as well the continuation of the rule of *Lincoln Mills*, *supra*, that collective bargaining agreements are enforceable, pursuant to federal law, in the federal courts. The only possible interpretation of the legislative intent is that Congress meant what it said, and that maintenance of the status quo of collective bargaining would carry with it the fundamental principle—by then well established and well understood by Congress—that federally mandated collective bargaining agreements are enforceable in the federal courts.

C. *Under the Plain Language of § 13(c) and Its Legislative History, § 13(c) Rights Are Enforceable in Federal Court*

The legislative history thus leaves no doubt that federal law is the source of the right that the Union asserts to have its collective bargaining agreement with Jackson remain in effect. It was the intent of Congress that federal law would determine the binding effect of labor protection agreements under § 13(c) and of the collective bargaining agreements reached pursuant to § 13(c) between unions and recipients of UMTA funds. Federal law is thus the source of the right the Union asserts in this case. For that reason, the Union's claim arises under federal law for purposes of 28 U.S.C. §§ 1331 and 1337 (a), and those sections would create federal jurisdiction over the Union's claim regardless of the Congressional intent discussed above, to continue the right to federal enforcement of collective bargaining agreements as part of the "collective bargaining rights" that § 13(c)(2) preserves. That conclusion is not affected by the fact that the federal rights the Union seeks to enforce have been embodied in a § 13(c) agreement and in a collective bargaining agreement. An action to enforce either of those agreements arises under federal law.

1. The sum and substance of § 13(c) as it passed the Senate, and as it was ultimately enacted, is that state and local governments have a choice when they take over a private transit company which had a collective bargain-

ing relationship with a labor union: Either they can acquire and operate the transit system without federal funds, and exercise whatever authority they have as employers under state law; or, they can receive federal funds and accept the conditions imposed by § 13(c) of UMTA, including the preservation of collective bargaining rights, notwithstanding what state law would otherwise provide. Under UMTA, as enacted, acceptance of federal funds brought the public transit authority under the federal regime.

That federal regime is effectuated by labor protective arrangements required by the Act, which Congress understood would be embodied in agreements between the grantee governmental entity and the representatives of its employees (the § 13(c) agreement). It also includes the obligation to make and maintain collective bargaining agreements—the essence of the "collective bargaining rights" preserved by § 13(c)(2).

2. Section 5(2)(f) of the Interstate Commerce Act was the model for § 13(c), and the structure of § 13(c) parallels § 5(2)(f). Section 5(2)(f) provides that its protections are accorded by a negotiated labor agreement. The legislative history of § 13(c) reflects that Congress expected that § 13(c) protections, like § 5(2)(f) protections, would be negotiated and embodied in contractual agreements between the grant recipient and its employees, and that those agreements would be presented to a federal authority for certification that they effectuate the federal act.

The witnesses testifying in favor of a labor protection provision all invoked § 5(2)(f) of the Interstate Commerce Act and developments under that provision as a model for meeting their concerns. Mr. Cushman testified:

> In 1936, in a collective bargaining agreement, 85 percent of the railroads in the 21 standard railroad labor organizations provided job protection for employees who either lost their jobs or otherwise were adversely affected as a result of a "coordination."

> This agreement is entitled, "The Agreement of May 1936, Washington, D.C.," and is commonly referred to as the "Washington Agreement." *This agreement has taken on a quasi-public status.* As will subsequently be shown, the terms of this agreement have been frequently applied by the Interstate Commerce Commission, by the Civil Aeronautics Board for airline employees, and by the various Presidential emergency boards which have had to consider job protection issues which were placed before them. *Thus, the agreement, while privately negotiated, has taken on a public status, and is, indeed, part and parcel of what might be called the law of employee protection in the railroad industry for railroad employees. Basically, this is the kind of protection which we are urging be extended to all employees adversely affected by technology or by any grants or Federal assistance granted under this act.* [Sen. Hearings, p. 330 (emphasis added).]

See also Sen. Hearings, pp. 327, 329, 330, 373 (Cushman test.); House Hearings, pp. 563, 607-68 (Cushman test.); p. 642 (Leighty test.). The Senate Report reflects the same commitment to a scheme of bargaining over the precise labor protections to be required in each situation:

> The committee does not believe that it is feasible to enumerate or set forth in great detail the provisions that may be necessary to assure the fair and equitable treatment of employees in each case. In this respect, it is expected that specific conditions normally will be the product of local bargaining and negotiation, subject to the basic standard of fair and equitable treatment. [Sen. Rep., p. 28.]

Senator Morse's amendment incorporated § 5(2)(f) standards expressly in the terms of § 13(c), and on the Senate floor opponents and proponents all acknowledged that § 5(2)(f) was the model for their action. 109 Cong. Rec. 5677, 5679. Moreover, the Secretary of Labor, charged with determining the fair and equitable arrangements here, requires the parties to negotiate a § 13(c)

agreement in order to effectuate the purposes of the Act. 29 C.F.R. § 215.

This Court articulated the relationship of the § 5(2)(f) labor protective agreements to their parent statute in *Norfolk & Western Co.* v. *Nemitz*, 404 U.S. 37, 42 (1971). Affirming the lower courts' enforcement of the detailed provisions of the § 5(2)(f) agreement, this court observed:

> We reviewed the history of § 5(2)(f) in Railway Labor Executives' Assn. v. United States, 339 U.S. 142, and said that "one of its *principal purposes was to provide mandatory protection for the interests of employees* affected by railroad consolidations." *Id.*, at 148. That "mandatory protection" can be accorded by terms provided by the Commission, or, *as is more likely, by provisions of a collective agreement which the Commission adopts or approves as adequate* . . . . [Emphasis added.]

Here, as in § 5(2)(f), the § 13(c) agreement is the vehicle for according the statutory protections to the employees that Congress intended to protect.

3. From time to time, Congress provides in federal law that two parties are to become signatories to a specified type of agreement as a condition of securing federal monies or to meet a requirement of federal law. In the only two cases in this Court involving such a Congressional command of which we are aware, the Court held that the resulting agreements are federal contracts whose enforcement and construction are governed by federal law and that suits on such contracts "arise under the laws of the United States" for the purposes of 28 U.S.C. §§ 1331 and 1337. *American Surety Co.* v. *Schulz*, 237 U.S. 159 (1914); *Machinists* v. *Central Airlines*, 372 U.S. 682 (1963).[15]

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[15] *Machinists*, by its terms, and by the precedents before and since, is not limited to the particular statute involved. *American Surety Co.* v. *Schulz*, employed the same analysis in a suit on a supersedeas bond, and held that a bond given pursuant to a federal statutory

Section 204 of the Railway Labor Act, 45 U.S.C. § 184, at issue in *Machinists*, provides that airlines and their employees must establish arbitration boards for resolution of disputes between them. Accordingly, the airline and union in *Machinists* executed a contract, the § 204 agreement, which established such a board. The statute was completely silent regarding the nature of such Boards, and the statute set only outer limits on the Board's jurisdiction. However, the § 204 Agreement provided for the jurisdiction of the Board and provided that the decision of the Board should be "final and binding" (*Id.* at 683-84). When the airline refused to abide by such a binding award, the union sued in federal court for enforcement of the provision in the § 204 contract that the awards be binding. The District Court dismissed for want of federal jurisdiction, and the Court of Appeals affirmed, ruling, as Petitioners suggest here, that an action to enforce compliance with an agreement mandated by federal law is only a common law contract action, and can be brought only in state court.[16]

This Court reversed. First, this Court examined the history and purpose of the Act to determine whether Congress meant the mandate to establish adjustment boards to be a "casual suggestion to the air industry" (*id.* at 686) or a "legally enforceable statutory com-

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command gives rise to a suit in federal court. Indeed, this Court relied on *Schulz* in *Machinists*. 372 U.S. at 692-93. In addition, three months before passage of UMTA, a lower federal court had construed *Machinists* directly to provide the analysis for enforcement of agreements mandated by § 5 on which § 13(c) was patterned. *Florida East Coast Ry.* v. *Jacksonville Terminal Co.*, 328 F.2d 720 (5th Cir.), *cert. denied*, 379 U.S. 830 (1964).

[16] Even the lower court in *Machinists* did not hold, as Petitioners actually contend here, p. 31, *infra*, that the § 204 Agreements could create no rights beyond what existed under state law absent such agreements. The lower court had found that as a minimum the terms of the agreements would be enforceable and binding under state law. *Machinists* v. *Central Airlines, Inc.*, 295 F.2d 209, 214 (5th Cir. 1961).

mand" (*Id.* at 690). The Court concluded that, given the problem Congress sought to solve, it could not have left compliance with the duty to make the agreement up to the whim of the parties. The duty to agree being mandated by federal law, this Court concluded that " 'the extent and nature of the legal consequences' of this duty 'though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted.' " [*Id.* at 690, citing *Deitrick* v. *Greaney*, 309 U.S. 190 (1939).]

This Court continued that federal law would therefore determine whether the contract provisions were consistent with the Act, sufficient to effectuate the statute, *and enforceable*:

> It is therefore the statute and the federal law which must determine whether the contractual arrangements made by the parties are sufficient to discharge the mandate of § 204 and are consistent with the Act and its purposes. *It is federal law which would determine whether a § 204 contract is valid and enforceable according to its terms.* [372 U.S. at 691 (emphasis added).]

This Court noted that the Agreement creates binding legal relationships only because of the sanction of federal statute:

> *If any provision* contained *in a* § 204 *contract is enforceable it is because of congressional sanction*: "[T]he federal statute is the source of the power and authority * * *. The enactment of the federal statute * * * is the governmental action * * * though it takes a private agreement to invoke the federal sanction. * * * [*Id.* (emphasis added).]

The Court concluded:

> The contract of the parties here was executed under § 204 [of the Railway Labor Act] and declares a system board award to be final, binding, and conclusive. The claim stated in the complaint is

> based upon the award and demands that it be enforced. Whether Central must comply with the award or whether, instead, it is impeachable, are questions controlled by federal law and are to be answered with due regard for the statutory scheme and purpose. To the extent that the contract imposes a duty consistent with the Act to comply with the awards, that duty is a federal requirement. If Central must comply, it is because federal law requires its compliance.
>
> In the circumstances we have here, we are not dealing with a suit involving an aspect of federal law which is only collateral or remote or a case where state and federal laws are so blended as to present a serious question of the scope of the arising-under provision of § 1331 or § 1337. . . . In our view the complaint in this case, for jurisdictional purposes, presented a substantial claim having its source in and arising under the Railway Labor Act and the District Court therefore has jurisdiction under 28 U.S.C. § 1331 if the jurisdictional amount is satisfied and in any case under § 1337. [372 U.S. at 695-696; citations and footnotes omitted.]

The *Machinists* analysis leads to the same result here: Congress clearly did not intend the mandate to make § 13(c) Agreements as a "casual suggestion to the transit industry." As set forth above, Congress considered and rejected "encouragement" as the standard for protective conditions and legislated instead to require their acceptance by the recipients of federal funds in order to ensure that they would not reenact the Dade County scenario.

The extent and legal consequences of the federally mandated statutory duty to make fair and equitable arrangements to preserve employee rights are a matter of federal law. The substantive minimum provisions are laid out in § 13(c), a federal statute. The particular provision Plaintiff seeks to enforce here—continued collective bargaining agreements—is a provision Congress

mandated must be included in the Agreement. The remaining provisions are determined by the federal Secretary of Labor to insure fulfillment of the statutory mandate.

Thus, to paraphrase *Machinists*:

> the provisions of a [13(c)] contract . . . are to be judged against the Act and its purposes and enforced or invalidated in a fashion consistent with the statutory scheme. There may be, for example, any number of provisions with regard to the [continuation of collective bargaining rights] that would satisfy [§ 13(c)] but we are quite sure that *some such* provision is requisite to a [§ 13(c)] contract . . . [372 U.S. at 694.]

As set forth above, Congress' avowed purpose in enacting § 13(c)—the preservation of the national labor policy of collective bargaining against the application of hostile state law—and the legislators' understanding that grant recipients would not be free to take the money and run, all bring this statute within the final rationale of *Machinists*:

> . . . it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme. [*Id.* at 691.]

Accordingly, as in *Machinists*, this action arises under the federal statute, and the federal court has subject matter jurisdiction to hear it.[17]

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[17] Affirming the court of appeals in this case will not have the consequence of bringing all actions for interpretation or enforcement of § 13(c) agreements or the collective bargaining agreements into the federal courts. Both of the agreements here—following the typical pattern for such agreements—provide for binding arbitration of disputes. This case comes to federal court only because Jackson repudiated the arbitration provisions along with the agreements and refused to submit to arbitration. (Appendix in Court of Appeals, at 302).

4. In order to escape the force of *Machinists*, Jackson argues here that § 13(c) and the agreements made pursuant to it do not create any federal rights because they do not create any rights at all. Jackson first argues that Congress created no rights beyond what state law would provide if the § 13(c) agreement did not exist. (Pet. Br., pp. 37, 39, 43, 45 ["the Union's rights, if any"].) As set forth above, the mandatory language of § 13(c), the legislative history establishing that it was meant to avoid federal financing of further Dade County situations, and ordinary common sense all preclude this result.[18] In the alternative, Jackson offers the proposition that § 13(c) rights are "transitional" and therefore last only while the ink is wet on the grant checks. (Pet. Br. p. 27 citing Sec. Wirtz.) In the testimony there cited, Secretary Wirtz was saying that the law would protect employees from the effects of the "transition" from private to public ownership. He did not say that the law would create obligations that evaporated the moment that transition occurred; such a cynical suggestion would have been quite out of character for him. Moreover, under Jackson's view, § 13(c)(2) would add nothing to § 13(c)(1), which requires the preservation of collective bargaining agreements existing at the time of the transition. Finally, Jackson contends that the state courts are capable of enforcing the union's statutory rights, "if any," afforded by the § 13(c) agreement. (Pet. Br. p. 39, n.49.) As we explained above, however, under 28 U.S.C. § 1331, if, as

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[18] Indeed, the language of § 13(c) placing "conditions" on the grant of federal funds would, even without the legislative history, create binding obligations. As this Court just stated in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), construing another spending law:

> When Congress intended to impose conditions on the grant of federal funds, as in [42 U.S.C.] §§ 6005, 6009, 6011, 6012, 6063, and 6067, it proved capable of doing so in clear terms. [*Id.* at 23.]

Whereas the particular provision at issue in *Pennhurst* (42 U.S.C. § 6010) did not expressly impose a condition on the grant of federal funds, § 13(c) does.

here, the plaintiffs' complaint states a claim to enforce federally created rights, the claim arises under federal law and federal jurisdiction is available, whether state courts are capable of enforcing those rights or not. *Cf. Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

D. *Even Without the § 13(c) Agreement, Respondent Would State a Claim for Enforcement of the Act*

In an effort to capitalize on the trend of recent decisions in this Court, Jackson characterizes this case as one for implication of a private right of action under a statute, as if there were no § 13(c) agreement and no collective bargaining agreement between the parties. Since this action is brought to enforce agreements to which the plaintiff-respondent is a party, Jackson has mischaracterized the issue; accordingly, the major portion of its argument is simply irrelevant. Moreover, even if it were necessary to imply a right of action, Jackson could not prevail, for such a cause of action lies here under the specific precedent of *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979) ("TAMA"), as well as the more general standards which this Court has developed (see p. 34, n. 19, *infra*).

In TAMA, this Court considered and rejected the claim that it should not imply a federal action where a federal statute created a relationship with accompanying rights that are traditionally enforced by private parties. Section 215 of the Investment Advisors Act, 15 U.S.C. § 80b-15, at issue there, provided that certain investment contracts "shall be void," but the Act did not provide expressly for any private action to void the contract. This Court noted that,

> A person with the power to void a contract ordinarily may resort to the court to have the contract rescinded. [444 U.S. at 18.]

Based on this proposition, the Court definitively rejected the suggestion, made again here, that federally created

contract rights should be remitted to enforcement in state court, holding:

> One possibility, of course, is that Congress intended that claims under § 215 would be raised only in state court. But *we decline to adopt such an anomalous construction* without some indication that Congress in fact wishes to remit the litigation of a federal right to the state courts [*Id.* at 19, n.8 (emphasis added).]

The same analysis applies here. Section 13(c) provides for the formation of binding contracts and binding collective bargaining agreements—obligations that are "ordinarily" enforceable in court. Those obligations exist by virtue of, and are defined by, federal law. Even if the federal principles of collective bargaining as defined by *Lincoln Mills, supra,* and the legislative history of § 13(c) did not compel the conclusion that Congress intended federal enforcement of these obligations, the principle of *TAMA* would.[19]

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[19] TAMA aside, the general standards for implying a private right of action are fully met in this case. Those standards, as articulated in *Cort* v. *Ash,* 422 U.S. 66 (1975), and *Texas Indus., Inc.* v. *Radcliff Materials, Inc.,* —— U.S. ——, 101 S.Ct. 2061 (1981), are satisfied under the following analysis:

(1) The plain language of the Act protects "rights" of the employees, as the especial beneficiaries. The legislative history also reveals that § 13(c) was enacted "for the protection of the interests of employees who may be affected by federal assistance." *Cannon* v. *University of Chicago,* 441 U.S. 677, 690-91, n.13 (1979).

(2) The legislative history demonstrates conclusively that what became § 13(c) was an integral part of UMTA:

> [This paragraph] concerns the protective arrangements respecting interests of employees affected by the bill. As we know, any legislation which is intended to provide Federal aid for the purpose of strengthening and improving our urban mass transportation systems must be concerned with another highly important factor, the stability of labor relations. *It is a necessary corollary of any such consideration that there be provisions which would safeguard employee rights and promote and maintain the national labor policy with a view toward insuring*

It is not even necessary to reach the hypothetical question of whether to imply a private right of action from UMTA for the additional reason that the Civil Rights Act of 1871, 42 U.S.C. § 1983, provides an express private right of action for enforcement of the statutory right here. The Civil Rights Act provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution *and laws* shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress (emphasis added).

Two years ago, in *Maine* v. *Thiboutot*, 448 U.S. 1, 4 (1980) this Court held that "the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law." Here, § 13(c) specifically requires protection of "collective bargaining rights." As set forth above, § 13(c) is mandatory, not precatory, Congress having eschewed the precatory language of "encouragement." *Cf. Pennhurst, supra*, p. 1542. By abrogating the collective bargaining agreement in the middle of its term, Jackson violated the federal statutory right to continued collective bargaining. Under *Maine*, § 1983 provides Respondent with a remedy for this violation.

Indeed, this case resembles *Maine* in every material respect. In *Maine*, as here, the federal Act required that, in order to receive federal money, the state must establish

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labor relations stability and promoting employee morale, [109 Cong. Rec. 5670 (remarks of Sen. Morse) (emphasis added).]

(3) Employee protections are entirely the product of federal law, patterned after § 5(2)(f) of the federal Interstate Commerce Act, and designed to preserve federal collective bargaining rights against the application of local law after a local public takeover.

a "plan" providing certain minimum federal benefits for the plaintiff. 42 U.S.C. § 602(a)(7). In *Maine*, as here, the statute requires the grant recipient to present the state plan to the federal agency for approval. 42 U.S.C. § 601. In *Maine*, as here, the plan provided plaintiff with benefits with federal law required. In *Maine*, as here, the state executed the writing the federal law required, presented it to the United States, and took the money. In *Maine*, as here, by violating the state commitment embodying the rights that Congress mandated, the state violated the requirements of federal law, and § 1983 provides a remedy.[20]

In sum, the mandate of § 1983 creates remedies for Jackson's conduct here. Accordingly, unless *Petitioners can prove* affirmatively that, in enacting § 13(c), Congress intended to waive the Union's § 1983 remedies, *Middlesex Co. Sewerage Auth.* v. *National Sea Clammers Ass'n*, —— U.S. ——, 101 S.Ct. 2615, 2627, n.3 (1981) (majority); *id.* at 2629, n.11 (dissent), the Union's § 1983 claim must stand.

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[20] To the extent that this case differs from *Maine*, it presents a stronger case for federal enforcement. First, unlike § 13(c), the welfare statute at issue in *Maine* provides an explicit administrative remedy of fund cutoff for violations of the provisions of the Plan mandated by the Act. No analogous Administrative remedy is present here. 42 U.S.C. § 604(a). Indeed, both the Secretary of Labor and the Secretary of Transportation insist that they have no role in enforcing the agreements. Second, unlike § 13(c), § 601 of the Social Security Act requires the State only to submit to the Secretary a plan containing the requisite provisions. Here, Congress mandated the grant recipient to take steps unassailably directed at creating a bilateral relationship with a particular class of persons. Third, *Maine* arose from the Social Security Act, a scheme of cooperative federalism. *New York Dept. of Social Services* v. *Dublino*, 413 U.S. 405 (1973). This case arises from a statute Congress passed deliberately to protect the federal labor relations in private transit companies from certain effects of state law following a public takeover. Accordingly, the basis for the holding that Congress created federal rights to receive the benefits of the state commitment, enforceable under 42 U.S.C. § 1983, is stronger here than it was in *Maine*.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

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Reply Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE,
Petitioners,

v.

LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

		PAGE
ARGUMENT:		
I.	Introduction	1
II.	UMTA § 13(c) Did Not Incorporate § 301 of the Labor Management Relations Act, or Repeal by Implication the Exemption of Municipalities From the Coverage of that Act	2
III.	Neither the Railway Labor Act nor the Decision in *Central Airlines* Justifies Implication of a Private Federal Remedy Under UMTA § 13(c)	10
IV.	Analysis of Congressional Intent is Required, not Excused, by the Decision in TAMA	15
V.	This Case Involves Contract Rights, and Not Rights Secured by the Laws of the United States, Within the Meaning of the Civil Rights Act of 1871	17
CONCLUSION		20

TABLE OF CITATIONS

Cases

Allen v. McCurry, 449 U.S. 90, 101 S. Ct. 411, 418 (1980) 18, 19

Amell v. United States, 384 U.S. 158, 86 S. Ct. 1384 (1966) 9

A.T.U., Div. 819 v. Byrne, 568 F.2d 1025 (3d Cir. 1977) 4

Ayres v. Int'l Bhd. of Elec Workers, 666 F.2d 441, 443-44 (9th Cir. 1982) 4

Bell v. Hood, 327 U.S. 678, 66 S. Ct. 773 (1946) 20

PAGE

Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) 13, 16, 18

City of Macon v. Marshall, 439 F. Supp. 1209 (M.D. Ga. 1977) 5, 6, 17

Congress of Ry. Unions v. Hodgson, 326 F. Supp. 68 (D.D.C. 1971) 11

Crilly v. S.E.P.T.A., 529 F.2d 1355 (3d Cir. 1976) 4

Gully v. First National Bank, 299 U.S. 109, 57 S. Ct. 96 (1936) 20

Kendler v. Wirtz, 388 F.2d 381 (9th Cir. 1968) 6

Local Div. 589, etc. v. Massachusetts, 666 F.2d 618 (1st Cir. 1981) 6, 9, 14

Local Div. 732, A.T.U. v. M.A.R.T.A., 667 F.2d 1327 (11th Cir. 1982) ..... *passim*

Local Div. 1285, etc. v. Jackson T.A., 447 F. Supp. 88 (W.D. Tenn. 1977), rev'd 1379 (6th Cir. 1981) 3, 17, 19

Maine v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502 (1980) 17

Machinists v. Central Airlines, 372 U.S. 682, 83 S. Ct. 956 (1963) 11, 12, 13, 14

Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473 (1961) 18

National League of Cities v. Usery, 426 U.S. 833, 96 S. Ct. 2465 (1976) 5

Norfolk & Western Ry. Co. v. Nemitz, 404 U.S. 37, 92 S. Ct. 185 (1971) 11

Osborn v. American Ass'n of Retired Persons, 660 F.2d 740 (9th Cir. 1981) 16, 17

Pennhurst State Sch. & Hosp. v. Halderman, ___ U.S. ___, 101 S. Ct. 1531, 1545 (1981) 18

Schatte v. International Alliance, etc., 182 F.2d 158 (9th Cir. 1950) 2

Textile Workers v. Lincoln Mills, 353 U.S. 448, 77 S. Ct. 912 (1956) 2, 3, 5, 12

PAGE

Touche Ross & Co. v. Redington, 442 U.S. 560, 99 S. Ct. 2479 (1979) 5, 16

Transamerica Mortgage Advisers v. Lewis, 444 U.S. 11, 100 S. Ct. 242 (1979) 10, 15

United States v. U.S. Continental Tuna Corp., 425 U.S. 164, 96 S. Ct. 1319 (1976) 9

United Transp. Union v. L.I.R.R., ___ U.S. ___, No. 80-1925 (March 24, 1982) 5, 14

Universal Interpretive Shuttle Corp. v. W.M.A.T.A., 393 U.S. 186, 89 S. Ct. 354 (1968) 9

Wood v. United States, 16 Pet. 342, 10 L. Ed. 987 (1842) 9

Federal Statutes

Civil Rights Act of 1871
42 U.S.C. § 1983 ..... 17, 18, 19, 20

Interstate Commerce Act
49 U.S.C. § 11347 ..... 10, 11

Investment Advisers Act
§ 206, 15 U.S.C. § 80b-6 16
§ 215, 15 U.S.C. § 80b-15 16

Judicial Code
28 U.S.C.
§ 1331 19
§ 1336 11
§ 1343 ..... 17, 20

Labor Management Relations Act
29 U.S.C.
§ 152(2) 1, 4, 7, 9
§ 185 ..... *passim*

Railway Labor Act
§ 204, 45 U.S.C. § 184 ..... 11, 12

Urban Mass Transportation Act of 1964
§ 13, 49 U.S.C. § 1609 ..... *passim*

PAGE

State Statutes

Tenn. Code Ann. § 6-3802 ..... 6, 8, 19

Legislative History

[1964] U.S. Code Cong. & Ad. News, 2584-85 ... 12

Hearings before the House Committee on Banking and Currency, 88th Cong., 1st Sess. (1963) 8, 15

109 Cong. Rec. 5345-48 (daily ed., April 4, 1963) 7, 14

ARGUMENT

I. INTRODUCTION

More than 17 years after enactment of the Urban Mass Transportation Act, the Respondent now asserts, for the first time before this Court, that Section 13(c) of the Act effectively recodified the jurisdictional and substantive labor law contained in Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Respondent's Brief at 8-9, 10, 23-4, 34. The Union argues that, notwithstanding the palpable silence of Congress on the point,[1] the "only possible interpretation of the legislative history [of UMTA § 13(c)] is that Congress meant . . . that maintenance of the status quo of collective bargaining would carry with it the fundamental principle . . . that federally mandated collective bargaining agreements are enforceable, in the federal courts." Resp. Br. at 24. Blurring all distinctions between collective bargaining agreements and "§ 13(c) agreements," the Union contends, without any authority for its novel proposition, that Congress intended to include in the "collective bargaining rights" to which UMTA § 13(c)(2) refers "not only the right to negotiate contracts, but also the right to enforce them as a matter of federal law . . ." Resp. Br. at 23. Not even the Sixth Circuit's decision in this case is offered in support of the Union's contentions.

[1] The only part of UMTA's legislative history to which the Union refers that in any way specifically concerns any part of the Labor Management Relations Act, is that summarized in note 14 of the Union's Brief. There the Union offhandedly states that "Senator Morse also explicitly noted that . . . § 13(c) would *not* amend the National Labor Relations Act. . . ." which is a part of the LMRA. *See* Resp. Br. at 22 n.14 (emphasis added). *See also* Petitioner's Brief at 28-31, 33, 37-8. Senator Morse confirmed that § 13(c) did not repeal the exemption of municipalities from the Act's coverage. If anything, therefore, the chief sponsor of § 13(c) recognized that § 301 of the LMRA would *not* be absorbed by UMTA § 13(c), and that its application to municipalities like Jackson would remain proscribed by 29 U.S.C. § 152(2).

The Union's Brief is all the more remarkable because of its complete abandonment of the Sixth Circuit majority's decision in this case,[2] its total inattention to the decisions of other circuits which have considered the issues before the Court,[3] and its failure to mention the most recent one of those decisions, *Local Div. 732, A.T.U. v. M.A.R.T.A.*, 667 F.2d 1327 (11th Cir. 1982), which refuted many of the arguments on which the Union now relies.[4] The Union attempts to mask these changes in its position by the bare assertion that the Petitioner's argument "is simply irrelevant," Resp. Br. at 33, 34 n.19. Not even the Sixth Circuit attempted to dismiss the Petitioner's arguments so blithely.

II.

UMTA § 13(C) DID NOT INCORPORATE § 301 OF THE LABOR MANAGEMENT RELATIONS ACT, OR REPEAL BY IMPLICATION THE EXEMPTION OF MUNICIPALITIES FROM THE COVERAGE OF THAT ACT.

The Union's primary contention is that the Congress included in UMTA § 13(c)(2) all of the substantive and procedural law enacted by Congress in LMRA § 301, and thereafter developed by the courts as a matter of federal common law, *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 77 S. Ct. 912 (1956). As the Union itself recognizes, prior to 1947, when § 301 was enacted, suits on collective bargaining agreements were not subject to federal jurisdiction and could only be brought in state court. Resp. Br. at 8. *See e.g. Schatte v. International Alliance, etc.*, 182 F.2d 158, 164 (9th Cir. 1950). An amendment of the LMRA, in the form of § 301, was required to grant federal courts

[2] The Sixth Circuit's opinion is not even cited in the Union's Table of Authorities. Resp. Br. at iv-v.

[3] Compare the Union's Brief on the Merits to its Brief in Opposition to the Petition for Certiorari at 6 n.5, 9-13, 30.

[4] Respondent's Counsel of Record was also the Union's counsel in *Local Div. 732*, and could not have been unaware of the decision.

jurisdiction of such actions and to provide unions and their members with "a procedural remedy lacking at common law." *Textiles Workers v. Lincoln Mills, supra* at 451. The language of § 301 clearly and expressly provides that "Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties . . .," 29 U.S.C. § 185(a), and it defines the jurisdiction of the district courts over labor unions, 29 U.S.C. § 185(c). No similar language can be found in UMTA.

Nor is there present in the legislative history of UMTA § 13(c) any expression of congressional intent to provide a cause of action cognizable in federal court similar to the explicit statements of legislative intent found in the history of LMRA § 301. Resp. Br. at 9. Quoting the Senate and House Reports on § 301, this Court has noted the purpose stated by Congress that § 301 would make "labor organizations equally responsible with employers for contract violations and provide[] for suit by either against the other in the United States district courts." *Textile Workers v. Lincoln Mills, supra* at 454. Surely, if Congress meant to create the same sort of federal remedy for workers employed by municipally owned transit systems, it knew how to do so unambiguously. However, the language of § 13(c) provides no such cause of action, and the "legislative history of the UMTA does not offer the kind of smoking gun that would make clear precisely what, if anything, Congress intended to imply into the statute." *Local Div. 732, etc. v. M.A.R.T.A.*, 667 F.2d at 1332. *See also Local Div. 1285, etc. v. Jackson T.A.*, 650 F.2d 1379, 1384 (6th Cir. 1981), Pet. App. at 10a ("The legislative history of § 13(c) is simply not explicit.").[5]

[5] *See* pages 9 and 10, *infra*, on the implications of this legislative silence.

Moreover, the Union's suggestion to this Court is directly contradicted by the explicit and repeated statements of proponents of UMTA § 13(c) that the exemption of municipalities from the National Labor Relations Act, 29 U.S.C. § 152(2), a part of the LMRA, would not be repealed by enactment of § 13(c). *See* Resp. Br. at 22 n.14; Pet. Br. at 29-31, 37, 43. That exemption from coverage was recently recognized in *Crilly v. S.E.P.T.A.*, 529 F.2d 1355 (3d Cir. 1976), a case not cited by the Union. In *Crilly*, a bus driver brought suit against his union and his employer, alleging that he had been discharged in violation of the collective bargaining agreement between the two defendants. Crilly asserted that the court had jurisdiction of the matter under LMRA § 301. S.E.P.T.A. and the union moved to dismiss Crilly's complaint for lack of subject matter jurisdiction, because, as a Pennsylvania political subdivision, S.E.P.T.A. was exempted from § 301's coverage by 29 U.S.C. § 152(2). After reviewing the legislative history of § 301, the Third Circuit concluded that Crilly's action was properly dismissed, because transit authorities, like S.E.P.T.A. and Jackson, are exempt from § 301's coverage. *Id.* at 1362-63.[6] *See also, Ayres v. Int'l Bhd. of Elec. Workers*, 666 F.2d 441, 443-44 (9th Cir. 1982); and *A.T.U., Div. 819 v. Byrne*, 568 F.2d 1025, 1029 (3d Cir. 1977).

The exemption of municipalities from coverage under LMRA § 301 was recognized in congressional debates about UMTA § 13(c). Rather than alter that exemption, the proponents of § 13(c) sought to reinforce it. Had Congress sought to extend the coverage of § 301 to include municipal transit workers, by enacting UMTA § 13(c), it could have done so unambiguously by any one of the legislative techniques described in *Crilly*. It did not.[7]

[6] The Court also noted that "the extension of coverage is a legislative, not a judicial function."

[7] Finally, it should be noted that if Congress had implicitly or explicitly provided in UMTA § 13(c) that municipal transit

Here, as in other cases, the issue is not whether the Court can improve on the scheme which Congress enacted in UMTA, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578, 99 S. Ct. 2479, 2490 (1979), or whether it might have been better for Congress to have extended the coverage of LMRA § 301 to include public transit workers. Instead, the question remains whether Congress actually did so, and whether, by enacting UMTA, the Congress provided for such workers, either directly or by implication, a "procedural remedy lacking at common law," *Textile Workers v. Lincoln Mills, supra* at 451. No evidence of legislative intent has been offered by the Union to demonstrate that Congress provided any such remedy.

The Union's argument is premised on the assumption that, by seeking to preserve the status quo in relations between labor unions and their employers, after federal funds were supplied to permit local governments to take over failing private transit operations,[8] the Congress

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authorities would be subject to the coverage of § 301 of the LMRA, serious constitutional questions might be raised. *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465 (1976). Pet. Br. at 38 n.48. *But see United Transp. Union v. L.I.R.R.*, ___ U.S. ___, No. 80-1925 (March 24, 1982).

[8] The Union suggests that the "motive force of the effort that led to § 13(c) was a public takeover of a private transit company in Dade County, Florida," Resp. Br. at 10, and that § 13(c) was a measure designed "to prevent the use of federal funds to finance repetition of the Dade County scenario and instead to preserve the status quo of labor relations following public takeover of a private transportation company." Resp. Br. at 13. The Union itself notes that, in Dade County, "(1) Florida law completely prohibited the County from bargaining collectively; (2) Florida law allowed the public employer to abrogate the existing collective bargaining agreement, and (3) Florida law allowed the new publicly financed owner to refuse to employ any of the employees of the private company." Resp. Br. at 11.

A recent repetition of the "Dade County scenario" occurred in the City of Macon, Georgia. *See City of Macon v. Marshall*, 439 F. Supp. 1209 (M.D. Ga. 1977). There, after a failing private transit company was purchased by the City of

intended only to allow the right to strike to be governed by State law and to subject "all other rights" to the uniform

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Macon, an application was made by the City for UMTA grant funds. Because the City refused to agree to bargain collectively with the union which represented the private company's employees, Local 898 of the A.T.U., the Secretary of Labor refused to certify that Macon had made the "fair and equitable arrangements" needed to qualify it as an UMTA grant recipient. Macon received no federal funds. The Secretary's exercise of discretion, in refusing Macon certification, was upheld, in a mandamus action, by the district court, to whose jurisdiction the parties had stipulated. *Id.* at 1216, 1218-24. Like other courts, the *Macon* court concluded "that § 13(c) . . . commits the agency action of determining the fair and equitable arrangements that will protect the interests of employees who have previously enjoyed collective bargaining rights, to the Secretary of Labor's discretion," and that the exercise of that discretion "is not to be reviewed or 'second guessed' by [the] court." *Id.* at 1223. *See also Kendler v. Wirtz*, 388 F.2d 381 (3d Cir. 1968); *Local Div. 589, etc. v. Massachusetts*, 666 F.2d 618 (1st Cir. 1981).

The *Macon* decision exemplifies the way in which Congress intended UMTA § 13(c) mechanisms to work. When local law prohibits collective bargaining, the Secretary of Labor will first seek to find a means to circumvent the prohibition. *City of Macon v. Marshall, supra* at 1214-16. Only when a grant applicant refuses to bargain collectively, or to develop a means to enable it to do so, will federal funding be denied. Otherwise, the precise relations between a public employer and a transit union are left to the product of local bargaining and negotiation, without further federal intervention.

If, as the Union suggests, the purpose of Congress in enacting UMTA § 13(c) was "to prevent the use of federal funds to finance repetition of the Dade County scenario", that purpose has been accomplished here. Tennessee law does *not* prohibit collective bargaining between Jackson and the Union; it expressly authorizes public transit authorities "to bargain collectively with labor organizations representing employees . . .". Tenn. Code Ann. § 6-3802. Tennessee law does not permit abrogation of such agreements or firing of private employees; it authorizes transit authorities to make "fair and equitable arrangements" of the kind described in UMTA § 13(c). Tenn. Code Ann. § 6-3802. There is no Tennessee law that is "hostile" to collective bargaining. Jackson, Tennessee is simply *not* Dade County, Florida: the status quo with respect to collective bargaining in Jackson has been preserved. No more is required by UMTA § 13(c)(2).

domination of federal law and federal courts. Resp. Br. at 13-24. The Union's assumption is not supported by a careful reading of UMTA's legislative history.

Senator Morse clearly announced his purpose in proposing the amendment which ultimately became UMTA § 13(c), in his remarks when introducing the amendment, and his debate with Senator Goldwater immediately thereafter. Stating that his intent was "to maintain the status quo," 109 Cong. Rec. 5346 (daily ed., April 4, 1963), Senator Morse asserted that his amendment "would continue collective bargaining where it now exists," and it would "make[] it clear that collective bargaining in any situation where it now exists will be continued . . ." 109 Cong. Rec. 5345 (daily ed., April 4, 1963). Morse then engaged in a lengthy colloquy with Goldwater, which concerned state laws governing strikes by public employees and the Taft-Hartley exemption of municipalities from coverage under the LMRA. *See* Pet. Br. at 28-30. Never during the debate did Senator Morse seek to modify his introductory statements, which clearly limited the purpose of § 13(c)(2) solely to preservation of the right to bargain collectively. Never during his introductory remarks or his ensuing debate with Senator Goldwater did Senator Morse assert that federal courts would have jurisdiction of any labor dispute which might arise between a municipality and its transit workers. Instead, Morse sought to reassure Senator Goldwater that the legislation "deals with municipal and State problems, and not federal problems," and that "the Taft-Hartley exemptions are not changed by the amendment." 109 Cong. Rec. 5348 (daily ed., April 4, 1963).

Followed to its logical conclusion, the Union's argument would render §§ 13(c)(1), (3), (4) and (5) superfluous. The Union urges the Court to construe UMTA § 13(c)(2) to include a broad range of substantive, procedural and

jurisdictional law, encompassing far more than continuation of the process of collective bargaining where it exists. However, that broad construction of "collective bargaining rights" would include not only "right to enforce [collective bargaining agreements] as a matter of federal law" which the Union has discovered in the language of UMTA § 13(c)(2), but also each of the protections and assurances specifically enumerated in UMTA §§ 13(c)(1), (3), (4), and (5).[9] Resp. Br. at 23. If those other parts of Section 13(c) are not to be rendered meaningless or redundant, Section 13(c)(2) must be limited to its plain meaning. The statutory phrase, "the continuation of collective bargaining rights," means only what Senator Morse said it meant: the continuation of collective bargaining in any situation where it existed,[10] and no more.[11] Whether or not it might have been desirable for Congress to engraft upon municipal transit labor relations a federal statutory and judicial

[9] UMTA § 13(c) provides that the "fair and equitable arrangements" which it contemplates "shall *include, without being limited to*" provisions that the Secretary of Labor determines may be necessary for the matters enumerated in subsections (1) through (5). The general inclusory phrase contained in UMTA § 13(c), underlined above, gives the Secretary discretion to approve the parties' agreement to § 13(c) arrangements which do more, for example, than continue benefits under existing collective bargaining agreements, § 13(c)(1). If the "continuation of collective bargaining rights", § 13(c)(2), included more than the continuation of "collective bargaining where it now exists", the general inclusory phrase in § 13(c) would be entirely unnecessary.

[10] *See Hearings before the House Committee on Banking and Currency*, 88th Cong., 1st sess., at 637, containing the text of the labor provision of UMTA proposed by the AFL-CIO, and endorsed by the Union's predecessor. No provision was included, even in the Union's proposal, which made any reference to LMRA § 301. And, of course, the Union's proposed language concerning "enforcible provisions" was deleted by Congress. *See* Pet. Br. at 27-28.

[11] The Union has not alleged, and cannot allege, that its right to bargain collectively has been abridged by Tennessee law, since that State's law expressly recognizes that right. *See* Tenn. Code Ann. § 6-3802. Indeed, it is precisely because Tennessee law is not hostile to collective bargaining, or to collectively bargained agreements, that the Secretary of Labor certified

involvement akin to that which now exists in private industry, the Court "cannot interpret the ambiguous language of Section 13(c) to create it without a fairly clear indication that such was Congress's intent. . . ." *Local Div. 589, etc. v. Massachusetts*, 666 F.2d 618, 633. (1st Cir. 1981) (Supp. Pet. Apx. at 30a-32a). No such indication can be found. As the First Circuit noted, in *Massachusetts*:

> Had Congress intended to grant the Secretary of Labor NLRB-type (or more) power to override state law governing these local public employees, one would expect to find some indication that Congress at least thought about the matter. But instead, the legislative history is silent. Not a word indicates that Congress intended such a result. The unions in 1963 urged no such outcome.

Id. at 633.

In short, merely by reference to the continuation of collective bargaining rights in UMTA § 13(c)(2) the Congress did not reenact LMRA § 301 and repeal the exemption of municipalities provided in 29 U.S.C. § 152(2).[12] Nor does UMTA § 13(c) in terms provide the kind of cause of action or remedy expressly created by LMRA § 301. Hence, if any federal cause of action was provided by Congress in UMTA, it was created implicitly or not at all. And, if the Court "is to conclude that Congress meant more than it

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Jackson's eligibility for UMTA funding. Nor has the Union alleged that Jackson refused to bargain collectively: Jackson requested that the Union "sit down and discuss" the matter of a new collective bargaining agreement. Jt. Appx. at 46a. The Union refused, and chose to initiate this lawsuit instead.

[12] It is a "cardinal rule" of statutory construction that repeals by implication are not favored. *United States v. U.S. Continental Tuna Corp.*, 425 U.S. 164, 168-69, 96 S. Ct. 1319, 1323 (1976); *Universal Interpretive Shuttle Corp. v. W.M.A.T.A.*, 393 U.S. 186, 193, 89 S. Ct. 354, 358 (1968); *Wood v. United States*, 16 Pet. 342, 363, 10 L. Ed. 987 (1842). The party urging such a repeal bears a "heavy burden of persuasion", to demonstrate that a repeal was actually implied by Congress. *Amell v. United States*, 384 U.S. 158, 165-66, 96 S. Ct. 1384, 1388 (1966).

said when it enacted a statute, [it should] do so on the basis that Congress actually intended to legislate as [the Court may] infer," because "The issue is not whether, on balance, adovcates of judicial remedies have a better case than opponents, but whether we can find a legislative intent to recognize a federal judicial remedy. . . . [I]f the legislative history provides no clear indication one way or the other, so that clear evidence of affirmative congressional intent is lacking, [the Court] cannot infer that Congress has legislated silently. . . ." *Local Div. 732 v. M.A.R.T.A.*, 667 F.2d at 1335 (footnote omitted).

III.

NEITHER THE RAILWAY LABOR ACT NOR THE DECISION IN *CENTRAL AIRLINES* JUSTIFIES IMPLICATION OF A PRIVATE FEDERAL REMEDY UNDER UMTA § 13(c).

Seeking to uncover "in the language or structure of [UMTA § 13(c)] or the circumstances of its enactment," *id.* n.15, *quoting Transamerica Mortgage Advisers v. Lewis*, 444 U.S. 11, 18, 100 S. Ct. 242 (1979), some evidence that Congress "actually intended" to endow the federal courts with jurisdiction of a cause of action implicitly created by UMTA § 13(c), the Union argues, in the alternative, that Congress "expected" that "§ 13(c) protections", would be identical to protections contemplated by § 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 11347 (formerly 49 U.S.C. § 5(2)(f)), and that certification of § 13(c) agreements by the Secretary of Labor would have an effect identical to the incorporation of "§ 5(2)(f) protections" in an order of the Interstate Commerce Commission. Resp. Br. at 25-7; R.L.E.A. Amicus Br. at 10-12. The same argument was recently rejected by the 11th Circuit in *Local Div. 732*:

> "The Union's argument founders, however, on the fact that at the time of the enactment of the UMTA,

> neither § 5(2)(f) of the Interstate Commerce Act nor § 5(2)(f) arrangements had been held to be privately enforceable. The principal case cited by the Union . . . *Norfolk & Western Rv. Co. v. Nemitz*, 404 U.S. 37, 92 S. Ct. 185 (1971), was decided 7 years after the passage of the UMTA. * * * Furthermore, the Union does not offer a shred of evidence that the Congress that enacted the UMTA thought that § 5(2)(f) arrangements were privately enforceable. . . . Thus, the view that the Congress that enacted the UMTA in 1964 must have intended § 13(c) agreements to be privately enforceable in federal court because it modeled § 13(c) after another statute privately enforceable in federal court is untenable."

Id. at 1336-37.[13]

The Union has also attempted to analogize this case to the decision in *Machinists v. Central Airlines*, 372 U.S. 682, 83 S. Ct. 956 (1963). Describing the parties' § 13(c) and collective bargaining agreements as "federal contacts," the Union has suggested that those agreements, like the order entered by the "system board of adjustment" created by agreement of the parties in *Central Airlines* in compliance with § 204 of the Railway Labor Act, 45 U.S.C. § 184, must be enforced and construed in federal court, under federal law. Resp. Br. at 27-31.[14] The Union's argument, however, is flawed.

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[13] Footnotes omitted. The court in *Local Div. 732* distinguished *Nemitz* because the decision in that case turned on an I.C.C. order: "If and only if the I.C.C. had . . . reviewed and incorporated the agreement" there at issue, into its order authorizing a railroad merger" would there have been "jurisdiction under 28 U.S.C. § 1336, which grants to the district courts jurisdiction of civil actions to enforce I.C.C. orders." *Local Div. 732 v. M.A.R.T.A., supra* at 1336 n.21. *See* Pet. Br. at 16 n.15, and 44-49. *See also Congress of Ry. Union v. Hodgson*, 326 F. Supp. 68 (D.D.C. 1971), noting the difference between a "certification" and an "order."

[14] The Union apparently suggests that, since the terms of UMTA § 13(c) provide no decisional rules for construction of collective bargaining and § 13(c) agreements, the federal courts

First, the differences between the structure, language and purposes of UMTA § 13(c) and § 204 of the Railway Labor Act, at issue in *Central Airlines*, are readily apparent:

> "In the event of a controversy concerning a § 204 contract or a § 204 adjustment board, any necessary harmonizing of the private arrangement with the statutory purpose could occur only through the litigation process; the Railway Labor Act provides no other federal oversight of the private arrangement. Quite the contrary is true of 13(c) arrangements. Unlike the Railway Labor Act, UMTA § 13(c) seeks to ensure the fulfillment of the statutory mandate of a fair and equitable arrangement by requiring the approval of such arrangements by the Secretary of Labor as a condition of grant assistance. * * * Thus, the underlying premise of *Central Airlines*, that federal adjudication of actions to enforce awards by § 204 adjustment boards is necessary to vindication of the statutory mandate, is inapplicable here."

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should develop those rules as a matter of federal common law, citing *Textile Workers v. Lincoln Mills, supra.* Resp. Br. at 8-9, 24, 34. However, the implication of federal common law, to replace well-established principles of state law governing the interpretation and enforcement of contracts, is simply not warranted by the language or history of UMTA § 13(c), Pet. Br at 41-43, particularly when Congress contemplated that § 13(c) arrangements would be "the product of local bargaining and negotiations". [1964] *U.S. Code Cong. & Ad. News* at 2584-85. Pet. Br. at 28. As the 11th Circuit noted in *Local Div. 732*, it is "not . . . anomolous," in light of this history, to be reluctant "to impute to Congress the intention to grant to federal courts jurisdiction over a class of cases raising an unpredictable array of case-specific issues whose resolution does not depend upon interpretation of the federal statute." 667 F.2d at 1338. Here, as in *Local Div. 732*, the "disposition of this case requires a determination of the meaning of the § 13(c) agreement between the parties," and an interpretation of their collective bargaining agreement. Such a determination may be made "independent of the meaning of UMTA § 13(c)." *Id.* No federal common law is needed, therefore, to fill in statutory interstices, and aid this interpretive process.

Local Div. 732, etc. v. M.A.R.T.A., 667 F.2d at 1343 (footnote omitted).[15]

Second, as the court in *Local Div. 732* noted, there are substantial differences in the legislative history of the two statutes. As noted by this Court, the Congress "intended no hiatus in the statutory scheme" when it enacted the Railway Labor Act. *Central Airlines*, 372 U.S. at 690. It intended, ultimately, to create a National Air Transport Adjustment Board. *Id.* No such consideration exists here. And, significantly, the statutory scheme after which the National Air Transport Adjustment Board was to be patterned, governing the National Railway Adjustment Board, specified that the Board's awards were to be final and binding. *Id.* at 688. That fact, the 11th Circuit noted in *Local Div. 732*, when ". . . coupled with the Court's conclusion that Congress intended no hiatus in the statutory scheme, implies that awards by § 204 adjustment boards would be similarly final and binding; two of our sister courts, in discussing *Central Airlines*, have in fact understood the Railway Labor Act to so provide. *Portland*, 589 F.2d at 8; *La Crosse*, 585 F.2d at 1346. If Congress indeed intended to require that § 204 adjustment board awards be final and binding, a predicate for federal jurisdiction would exist which has no counterpart here." *Local Div. 732, etc. v. M.A.R.T.A.*, 667 F.2d at 1343-44.

Moreover, this Court in *Central Airlines* noted that "the needs of the subject matter [of § 204 of the Railway Labor

[15] Moreover, § 204 of the Railway Labor Act provided that "It shall be the *duty* of every carrier and of its employees . . . to establish a board of adjustment . . ." *Central Airlines*, 372 U.S. at 686. No similar language is found in UMTA § 13(c). As the Court has noted, the "right or duty-creating language of the statute has been the most accurate indicator of the propriety of implication of a cause of action." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n.13 (1979). Hence, it was proper to imply a cause of action in *Central Airlines*. It is not proper to do so here.

Act] manifestly call for uniformity," and that the burden which would be imposed upon interstate commerce would be increased "to an intolerable degree" if national airlines were required to conclude different § 204 agreements in 50 States, "or however many States the system spans." 372 U.S. at 692 nn.15 and 16. *See also United Transp. Union v. L.I.R.R.*, ___ U.S. ___, No. 80-195 (March 24, 1982), slip op. at 9-11. No such need for uniformity exists in the subject matter of UMTA generally, or § 13(c) in particular. To the contrary, UMTA "deals with municipal and State problems, and not federal problems," 109 *Cong. Rec.* 5348 (daily ed., April 4, 1963) (remarks of Sen. Morse). It deals with local transportation, not interstate commerce. The likelihood, forseen by the Union and the R.L.E.A., that state court proceedings to enforce and interpret § 13(c) and municipal transit collective bargaining agreements will result "in a hodge-podge of different arrangements", was also forseen and welcomed by Congress. [1964] *U.S. Code Cong. & Ad. News* at 2584-85. State law, the Congress declared, was not preempted by UMTA § 13(c). Pet. Br. 27-34. *Local Div. 589, etc. v. Massachusetts*, 666 F.2d at 628-36, Supp. Pet. Apx. at 19a-37a.[16]

Finally, at issue in *Central Airlines* was the enforceability of an order. At issue here is the enforceability of a collective bargaining agreement and the interpretation of a § 13(c) agreement. No administrative body, acting as a

[16] Contrary to the Union's assertion, it would not "be fatal to the goals of the Act" if the construction and enforcement of § 13(c) and local transit collective bargaining agreements were left to state law. Resp. Br. at 31. UMTA § 13(c) was designed to leave decisions about local labor conditions to "the product of local bargaining and negotiations." It would be fatal to *that* purpose if, as the Union suggests, every dispute about every provision in every collective bargaining agreement were subjected to federal judicial or administrative scrutiny or judgment. In this respect, too, *Central Airlines* is simply inapposite.

"public agency"[17] to issue orders resolving disputes between municipalities and their transit workers, was created by Congress in UMTA § 13(c). Nor was the creation of any such body, by agreement of the parties, contemplated by Congress. Indeed, the Congress enacted UMTA without language, sponsored by the Union's predecessor, which would have included among § 13(c) protective arrangements "enforcible provisions . . . insuring the existence of authority for any employer . . . to enter into enforcible arbitration agreements . . ." *Hearings before the House Committee on Banking and Currency*, 88th Cong., 1st sess., at 637 (Supplement to remarks of Mr. Cushman).[18] By rejecting the Union's proposal, the Congress refused to create the kind of statutory scheme considered in *Central Airlines*.

IV.

ANALYSIS OF CONGRESSIONAL INTENT IS REQUIRED, NOT EXCUSED, BY THE DECISION IN TAMA.

The Union's reference to *Transamerica Mortgage Advisers v. Lewis*, 444 U.S. 11 (1979) (*TAMA*), Resp. Br. at 33-34, is equally unavailing. In *TAMA*, the Court considered whether the Investment Advisers Act "creates a private cause of action for damages or other relief in favor of persons aggrieved by those who have allegedly violated it." *Id.* at 13. Finding that the Act "nowhere expressly provides for a private cause of action," *id.* at 14, the Court considered whether such a cause of action was implied by

[17] *See Central Airlines*, 372 U.S. at 695, describing the "system board of adjustments" there considered as a "public agency."

[18] *See also Hearings before the Senate Committee on Banking and Currency*, 88th Cong., 1st Sess., at 482, containing a statement by the Administrator of the Housing and Home Finance Agency concerning differences between the Union's and the Administration's proposal, which noted the possible state constitutional problems which might be created if UMTA § 13(c) were enacted in the form suggested by the Union.

Congress in the Act, and the Court applied the now familiar rules of statutory construction described in *Touche Ross & Co. v. Redington, supra, Cannon v. Univ. of Chicago, supra,* and in similar cases. Hence, the Union cannot invoke *TAMA* to avoid the analysis of legislative intent undertaken in the Petitioner's Brief on the Merits and in footnote 19 of the Union's Brief, for *TAMA* requires that analysis.

Beginning with the language of the Investment Advisers Act, the Court in *TAMA* considered the respondent's contention that a private right of action might "fairly be inferred from the language of two sections of the Act," § 206 and § 215. *Id.* at 16. In the case of § 215, the Court concluded "that the statutory language itself fairly implies a right to specific and limited relief in a federal court." *Id.* at 18. By declaring that certain contracts "shall be void," the Court stated, "§ 215 by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere." *Id.* A different situation was presented, the Court held, by § 206 of the Act, "which simply proscribes certain conduct," fraud, "and does not in terms create or alter any civil liabilities." *Id.* at 19.

The Union contends that "Section 13(c) provides for the formation of binding contracts and binding collective bargaining agreements — obligations that are 'ordinarily' enforceable in court." Resp. Br. at 34. Regrettably, the Union misquotes UMTA § 13(c). In terms, the language of UMTA § 13(c), like § 206 of the Investment Advisers Act, "does not . . . create or alter any civil liabilities." *TAMA, supra* at 19. Indeed, UMTA § 13(c) does not even require or proscribe any conduct by the Petitioner. Instead, UMTA § 13(c) "is only a directive to the Secretary of Labor to withhold federal funds" from municipalities and other grant applicants who do not make the "fair and equitable arrangements" which the Secretary determines "may be necessary" to protect certain interests of transit workers adversely affected by federal assistance. *See Osborn v.*

American Ass'n of Retired Persons, 660 F.2d 740, 744 (9th Cir. 1981). *See also City of Macon v. Marshall, supra.*

Unlike § 215 of the Investment Advisers Act, at issue in *TAMA*, which provides that certain contracts "shall be void", UMTA § 13(c) does *not* provide, in explicit language from which an inference of congressional intent might be discerned, that private § 13(c) contracts "shall be enforceable." Although Congress may have contemplated that § 13(c) arrangements would be privately negotiated, "it simply does not follow that such arrangements are enforceable in federal court," or even that they would necessarily take the form of contracts. *Local Div. 732, etc. v. M.A.R.T.A.*, 667 F.2d at 1338. In fact, the Union proposed in 1963 that UMTA § 13(c) include language to require that "protective arrangements shall include . . . enforcible provisions. . ." *See* Pet. Br. at 27-28, and note 8, *supra*. That language was rejected by Congress. Hence, this Court, like the court in *Local 732*, will "search the statute, the committee reports, and the congressional debates in vain for an intimation that Congress intended that federal courts resolve contractual disputes between municipal transit workers and their employers." *Id.* at 1338. *TAMA* cannot give the Union that which neither the language nor the legislative history of UMTA § 13(c) provides.

V.

THIS CASE INVOLVES CONTRACT RIGHTS, AND NOT RIGHTS SECURED BY THE LAWS OF THE UNITED STATES, WITHIN THE MEANING OF THE CIVIL RIGHTS ACT OF 1871.

Lastly, for the first time the Union argues "that the Civil Rights Act of 1871, 42 U.S.C. § 1983, provides an express private right of action for enforcement of the statutory right here." Resp. Br. at 35, citing *Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502 (1980).[19] The Union

[19] No mention of 42 U.S.C. § 1983 or 28 U.S.C. § 1343 can be found in the Union's complaint, Jt. Apx. 5a-11a, or in the decisions of the District Court, 447 F. Supp. 88, or the Court of Appeals, 650 F.2d 1379, in this case, Pet. Apx, at 1a-17a, 20a-30a.

has demonstrated great difficulty in identifying the "statutory right" which it alleges may have been breached, variously defining it as the "right to enforce [collective bargaining agreements] as a matter of federal law . . .," Resp. Br. at 23, the "right to federal enforcement of collective bargaining agreements as part of the 'collective bargaining rights' that § 13(c)(2) preserves," *id.* at 24, the "right . . . to have its collective bargaining agreement remain in effect," *id.*, and the "right to continued collective bargaining," *id.* at 35. The Union has encountered this definitional difficulty because UMTA § 13(c) contains no "right or duty-creating language," *Cannon v. Univ. of Chicago*, 441 U.S. at 690 n.13, and, instead, merely gives the Secretary of Labor a directive, typical in federal funding statutes, to withhold federal monies if he finds that certain "fair and equitable arrangements" are not made. *Compare* Resp. Br. at 22. Absent such a statutorily defined right, the Civil Rights Act, 42 U.S.C. § 1983, is simply inapplicable.[20]

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[20] Any interest the Union may have in the Secretary of Labor's compliance with § 13(c)'s directive to him is simply not a "right . . . secured by the . . . laws " of the United States within the meaning of 42 U.S.C. § 1983. *Cf. Pennhurst State Sch. & Hosp. v. Halderman*, ___ U.S. ___, 101 S. Ct. 1531, 1545 (1981). Moreover, that interest was fully satisfied when the Secretary of Labor certified the parties' § 13(c) agreement, some 15 years ago, as a condition of the single direct grant which Jackson received under UMTA.

Furthermore, one may question whether the 42nd Congress ever meant to reach the present situation, when it recodified § 1983. In reviewing the legislative history of § 1983, which surely contained no reference to collective bargaining agreements or federal funding of urban mass transit, the Court noted in *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473 (1961), and again last term in *Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411, 418 (1980), "that Congress had intended a federal remedy [under § 1983] in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. . . . In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights." None of those circumstances are pre-

As District Judge Wellford correctly found in this case, this "suit is not basically concerned with the validity or construction of a federal statute or the action taken by an administrative officer or agency under the provisions of the federal statute." *Local Div. 1285, etc. v. Jackson T.A.*, 447 F. Supp. 88, 94 (W.D. Tenn. 1977). Rather, this "lawsuit . . . is at bottom an action on a contract and not an action on a statutory violation." *Local Div. 732, etc. v. M.A.R.T.A.*, 667 F.2d at 1332. *See also* Resp. Br. at 4 (describing the "collective bargaining agreement, which is the subject of this lawsuit, [as] a garden variety collective bargaining agreement . . ."). Private contracts rights, of course, are not among the "rights . . . secured by the . . . laws" of the United States, 42 U.S.C. § 1983. *Id.* at 1345-46.[21]

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sented in this case. First, as noted throughout these proceedings, UMTA § 13(c) itself creates no federal rights in favor of the Union. Second, Tennessee state law is neither facially unconstitutional nor in any way hostile to the continuation of collective bargaining between the parties, or to the enforcement of § 13(c) agreements and valid collective bargaining agreements. Tenn. Code Ann. § 6-3802. The Union's real basis for its resort to federal court is hardly a legal basis at all, but rather a general distrust of the state courts. *See Allen v. McCurry*, 101 S. Ct. at 420. Yet, there is no evidence that Tennessee state courts are any less willing than Tennessee federal courts to do their mortal best to administer justice and resolve the parties' disputes fairly and imparitally. *See* Pet. Br. at 37 n.47.

[21] It is worth noting that before the 11th Circuit "the Union [did] not argue, and the legislative history belies, that there is any remedy, implied or otherwise, for the statutory violation the Union alleges. Thus, under the Union's theory, a plaintiff alleging a violation of UMTA § 13(c) via a breach of a 13(c) agreement can seek no remedy other than the common law remedies for breach of the underlying 13(c) agreement. The irony of the Union's theory is apparent: a party aggrieved by a breach of a 13(c) agreement being limited to common law contract remedies, will allege the statutory violation solely as a jurisdictional device." *Local 732, supra* at 1331. The "right to federal enforcement of collective bargaining agreements as part of the 'collective bargaining rights' that § 13(c)(2) preserves," which the Union asserts in its brief, Resp. Br. at 24, is simply a purported right to federal jurisdiction. That "right" cannot be the predicate for the assumption of jurisdiction under 28 U.S.C. § 1331, and cannot be a "right" within the meaning of 42 U.S.C.

As demonstrated in the Petitioner's Brief on the Merits, and in this Brief, the Union's attempts to find something more in this case than a simple breach of contract action are without substance. As the Union itself has recognized, "a complaint alleging a breach of [an] agreement, *without more*, [sets] forth only a breach of a private contract and [does] not invoke federal jurisdiction." *Id.* at 1331 (emphasis in original). Since nothing more than an alleged breach of a private contract between the Union and Jackson is at issue in this case, the District Court properly dismissed the Union's complaint for lack of jurisdiction. The decision of the Circuit Court, reversing the District Court's judgment was erroneous, and must itself be reversed.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that the Court reverse the judgment of the United States Court of Appeals for the Sixth Circuit in this case, and remand this case with instructions that the District Court's judgment, dismissing the Union's action for lack of subject matter jurisdiction, be affirmed.

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§ 1983 (otherwise, jurisdictional statutes themselves, like 28 U.S.C. § 1343(3), which gives federal courts jurisdiction of actions brought under 42 U.S.C. § 1983, might be the "laws" invoked by litigants, as the basis of their asserted "right" to federal jurisdiction "secured by the . . . laws" of the United States.)

See also Local 732, supra, at 1342, finding it "abundantly clear that the Union's asserted claim under UMTA § 13(c) is immaterial and made solely for the purpose of obtaining jurisdiction," and that *Gully v. First National Bank*, 299 U.S. 109, 112-113, 57 S. Ct. 96, 97-98 (1936), and *Bell v. Hood*, 327 U.S. 678, 681-83, 66 S. Ct. 773, 776 (1946), therefore required dismissal of the Union's complaint, *Local 732, supra* at 1340-42.

Amicus Brief

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No. 81-411

In the Supreme Court of the United States

OCTOBER TERM, 1981

JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE
Petitioners,

vs.

LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Motion for Leave to File Brief as Amicus Curiae in Support of Petitioners on Behalf of the American Public Transit Association and Brief of Amicus Curiae in Support of Petitioners on Behalf of the American Public Transit Association

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Motion for Leave to File Brief as Amicus Curiae in Support of Petitioners on Behalf of the American Public Transit Association

The American Public Transit Association (APTA), pursuant to Supreme Court Rule 42, hereby moves for leave to file a brief on the merits as amicus curiae in support of petitioners in this case. Respondent has refused to consent to the filing of such a brief, necessitating the instant motion. Petitioners' letter of consent to the appearance of amicus is on file with the Court.

APTA, a private non-profit corporation, is the national representative association of numerous public and private entities which

are involved in the provision of public mass transit services. APTA's voting members include more than 300 transit system operators, most of which are public entities, which provide more than 90% of all mass transit rides in the United States. Also included as associate members of APTA are manufacturers and suppliers to the industry, State Departments of Transportation and political subdivisions of State and local public bodies. The vast majority of APTA's mass transit system members receive federal financial assistance under the Urban Mass Transportation Act and, therefore, are subject to the provisions of Section 13(c) of the Act.

APTA regularly represents its members' interests in both the State and federal courts. APTA was granted leave by this Court to file a brief as amicus curiae in support of the petition for writ of certiorari to the Sixth Circuit in this case. APTA has also participated as amicus curiae in other matters before this Court.

The issues presented in this case concern the interpretation and method of enforcement of a "13(c) agreement." As most APTA members are parties to other 13(c) agreements, negotiated between the local transit agency and union pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964, any interpretation of the import or meaning of such an agreement has a direct and immediate impact upon APTA members.

In this case, the decision of the Sixth Circuit not only recognizes the federal courts as a forum for review of local transit agency management decisions, but it also recognizes a *federal transit labor law*, purportedly arising from the requirements of Section 13(c), that could be construed to supersede State public employee law. Should the decision of the Sixth Circuit be so construed, it would effect a major change in transit labor relations which would expand the scope of the Urban Mass Transportation Act far beyond the intent of Congress expressly stated by the Act's own sponsors. This result is of obvious concern to all of APTA's

public transit system members who have received federal financial assistance under the Act.

In its amicus brief in support of the petition for writ of certiorari, APTA argued and respectfully submits that the Sixth Circuit erred in deciding that federal subject matter jurisdiction and a private federal right of action exist for an alleged breach of a local collective bargaining agreement or a 13(c) agreement. APTA further submits that the Sixth Circuit erred in purporting to recognize a new federal transit labor law which, contrary to the repeatedly expressed intent of Congress, could supersede State public employee law. In order to illuminate and document this intent for the Court, APTA sought to thoroughly analyze the legislative intent surrounding the enactment of Section 13(c) as revealed principally by the repeated statements of its principal sponsors in both houses of Congress. APTA believes this analysis to be especially important in light of the manifest failure of the Court of Appeals for the several Circuits, save for the First Circuit in *Local Division 589, A.T.U. v. Commonwealth of Massachusetts,* No. 81-1180 (1981), to discuss or, apparently, consider this legislative history to any meaningful extent.

In its supplemental brief submitted in response to this discussion and to the arguments advanced by amicus, respondent has repeatedly misinterpreted and misrepresented the position taken by amicus. In particular, respondent's discussion of the legislative history, which constitutes the principal focus of its response, presents a skewed and distorted picture of the Congressional debates surrounding the passage of Section 13(c). Astonishingly, respondent has asserted that a proper analysis of this legislative history requires that the debates of an entire house of Congress, the House of Representatives, should be ignored.

Respondent's arguments respecting this legislative history and both the jurisdictional and private right of action issues presented in this case are simply wrong. APTA respectfully submits that

additional argument in response to the contentions asserted by respondent would be useful to the Court and would aid the Court in the resolution of the questions presented. In light of the dramatic impact upon labor relations in the mass transit industry occasioned by the decision of the Sixth Circuit, which adversely affects the ability of local public transit agencies to operate freely and efficiently, APTA respectfully requests that its motion for leave to file the accompanying brief on the merits as amicus curiae in support of petitioners be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether Congress, in enacting the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601, *et seq.*, intended to create a federal transit labor law enforceable in, and by, federal courts to govern contract disputes between public transit authorities and their employees. (Discussed in Argument I.)

2. Whether Congress, in enacting the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601, *et seq.*, intended to authorize federal courts to formulate a "federal common law" to govern contract disputes between local public transit authorities and their employees. (Discussed in Argument I.)

3. Whether an employee's, or union's, claim that a municipal transit authority breached a collective bargaining agreement executed in 1975 states a "claim arising under the laws of the United States" within the meaning of 28 U.S.C. § 1331(a) solely because the muncipal transit authority received federal funds, in 1966, through a grant authorized by the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601, *et seq.* (Discussed in Argument III.)

4. Whether Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1609(c), creates a federal private cause of action for an alleged breach of a collective bargaining agreement, executed in 1975, by a municipal transit operator who received federal funds under the Act, in 1966. (Discussed in Argument II.)

TABLE OF CONTENTS

Page

Interest of Amicus Curiae 1

Introductory Statement 4

Argument 7

I. Congress Did Not Intend That Section 13(c) of the Urban Mass Transportation Act Would Serve to Preempt or Supersede State or Local Public Employee law 7

II. Congress Did Not Intend to Create a Private Federal Remedy Under Section 13(c) of UMTA 13

A. The Test Set Forth in *Cort v. Ash* and Subsequent Supreme Court Cases Determines Whether a Private Right of Action May Be Inferred Under Section 13(c) 13

B. The Principles Set Forth in *Cort v. Ash* and Subsequent Supreme Court Cases Do Not Support an Inference That Congress Intended to Create a Federal Private Right of Action Under Section 13(c) 16

1. Local Transit Employees Are Not the Especial Beneficiaries of the Urban Mass Transportation Act 18

2. There Is No Evidence of Any Congressional Intent to Create a Federal Private Right of Action to Enforce a 13(c) Agreement 19

TABLE OF CONTENTS

Page

3. The Preceding Analysis of Section 13(c) Under *Cort v. Ash* is Dispositive. In Any Case, Analysis of Section 13(c) Pursuant to the Final Two *Cort* Factors Further Demonstrates that Congress Did Not Intend to Create a Private Federal Remedy For An Alleged Breach of a 13(c) Agreement 23

C. No Private Federal Remedy May Be Inferred Under Section 13(c) on the Basis of Either the Railway Labor Act or Section 5(2)(f) of The Interstate Commerce Act 24

D. Respondent Has No Federal Private Right of Action Under 42 U.S.C. Section 1983 28

III. An Alleged Breach of a 13(c) Agreement Does Not State a Claim Arising Under the Laws of the United States 30

Conclusion 31

TABLE OF AUTHORITIES

Cases	Pages
Brotherhood of Locomotive Engineers v. Chicago Etc. R.R. Co., 314 F.2d 424 (8th Cir. 1963)	26
California v. Sierra Club, ... U.S. ....., 68 L.Ed. 2d 101 (1981)	13, 15, 17, 18, 23, 29
Cannon v. University of Chicago, 441 U.S. 677 (1979)	15, 26
Chicago v. Atchison, Etc. R.R. Co., 357 U.S. 77 (1958)	25
City of Philadelphia v. Baker, 508 F.2d 279 (3d Cir. 1975), *cert. denied,* 422 U.S. 1042 (1975)	21
Cort v. Ash, 422 U.S. 66 (1975)	6, 13, 14, 15, 17, 18, 19, 23, 24
Davis v. Passman, 422 U.S. 228 (1979)	13
Division 1287, A.T.U. v. Kansas City Area Transit Authority, 582 F.2d 444 (8th Cir. 1978), *cert. denied,* 439 U.S. 1090 (1979)	14
Gully v. First National Bank, 299 U.S. 109 (1936)	30
Houston, East & West Texas R.R. Co. v. United States, 234 U.S. 342 (1914)	25
International Association of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963)	14, 18, 25, 26, 27, 30
Local Division 519, A.T.U. v. LaCrosse Municipal Transit Utility, 585 F.2d 1340 (7th Cir. 1978)	14, 16, 17
Local Division 589, A.T.U. v. Commonwealth of Massachusetts, No. 81-1180 (1st Cir. 1981)	2, 3, 5, 7, 9, 27, 28
Local Division No. 714, A.T.U. v. Greater Portland Transit District, 589 F.2d 1 (1st Cir. 1978)	14, 19
Local Division 1285, A.T.U. v. Jackson Transit Authority, 650 F.2d 1379 (6th Cir. 1981)	8, 16, 17
Lorillard v. Pons, 434 U.S. 575 (1978)	26
McDaniel v. University of Chicago, 548 F.2d 689 (7th Cir. 1977)	14

TABLE OF AUTHORITIES

Pages

Maine v. Thiboutot, 448 U.S. 1 (1980) 28

National League of Cities v. Usery, 426 U.S. 833 (1976) 24, 27
National Railroad Passenger Corp. v. Passengers Assn., 414 U.S. 453 (1974) 22

Osborn v. American Association of Retired Persons, 660 F.2d 740 (9th Cir. 1981) 19

Pennhurst State School and Hospital v. Halderman, ... U.S. ....., 67 L.Ed. 2d 694 (1981) 18, 28

Quincy College, Etc. v. Burlington Northern, Inc., 328 F. Supp. 808 (N.D. Ill. 1971), *affirmed*, 405 U.S. 906 (1972) 21

Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975) 24

Texas Industries, Inc. v. Radcliff Materials, Inc., ... U.S. ....., 68 L.Ed. 2d 500 (1981) 20, 22
Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 30
Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 15, 17, 23, 29
Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979) 14, 15, 17, 29

United States v. Pennsylvania R.R. Co., 323 U.S. 612 (1945) 25
United Transportation Union v. Long Island Railroad, 634 F.2d 19 (2d Cir. 1981), *cert. granted*, ... U.S. ....., 69 L.Ed. 2d 970 (1981) 27
Universities Research Assn. v. Coutu, ... U.S. ....., 67 L.Ed. 2d 662 (1981) 13, 17, 19, 24

Table of Authorities

Constitution and Statutes

Pages

United States Constitution, 10th Amendment 27

Investment Advisors Act, 15 U.S.C.
§ 80b-6 15
§80b-15 15

Labor Management Relations Act, 29 U.S.C.
§ 152 24
§ 185 24

Davis Bacon Act, 40 U.S.C.
§ 276 *et seq.* 14

Civil Rights Act of 1964, 42 U.S.C.
§ 2000d *et seq.* 26

Railway Labor Act, 45 U.S.C.
§ 151 *et seq.* 26
§ 152 First 27

Rail Passenger Service Act, 45 U.S.C.
§ 501 *et seq.* 21
§ 541 21
§ 545 21
§ 546 21
§ 547 ..... 22, 26
§ 565 ..... 21, 22, 26

Urban Mass Transportation Act, 49 U.S.C.
§ 1601 *et seq.* ..... passim
§ 1601 ..... 2, 4, 5, 18, 23
§ 1601a 2, 3, 18, 19, 23
§ 1601b 2, 3, 18

Table of Authorities

Pages

§ 1602 5
§ 1604 ..... 4, 5, 23
§ 1606 5
§ 1607 ..... 2, 5, 20, 23
§ 1608 ..... 5, 20, 23
§ 1609(c) ..... passim

Interstate Commerce Act, 49 U.S.C.
§ 10101 *et seq.* 25
§ 11347 ..... 25, 26

Supplemental Authorities

109 Congressional Record (1963) 7, 9, 10, 11, 12, 18, 19, 22, 27, 28

Senate Report No. 82, Banking and Currency Committee, 88th Cong., 1st Sess. (1963) 6, 29

Comptroller General Report to Congress, "Soaring Transit Costs Must Be Controlled" (February 26, 1981) 2

No. 81-411

In the Supreme Court of the United States

OCTOBER TERM, 1981

JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE

Petitioners,

vs.

LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Brief of Amicus Curiae in Support of Petitioners on Behalf of the American Public Transit Association

INTEREST OF AMICUS CURIAE

As discussed in its accompanying motion and prior brief to this Court in support of the Petition for Writ of Certiorari, the American Public Transportation Association (APTA) is the major representative of the interests of the American public transit industry. The vast majority of APTA's more than 300 voting members are publicly owned transit agencies, most of which, like petitioner Jackson Transit Authority, receive or have received federal assistance under the Urban Mass Transportation Act (UMTA) and, as one condition of such assistance,

have entered into "13(c) agreements" with local unions pursuant to Section 13(c) of the Act. 49 U.S.C. §§ 1601 *et seq.*, 1609(c).

The erroneous decision of the Sixth Circuit in this case affects not only petitioners City of Jackson and Jackson Transit Authority (Jackson), but all public transit agencies throughout the United States. By recognizing a private right of action in the federal courts to adjudicate a dispute arising out of an alleged breach of a collective bargaining agreement or 13(c) agreement, and by recognizing the existence of an undefined body of federal labor law applicable to local mass transit agencies which supersedes local public employee law, the Sixth Circuit has significantly interfered with local public employee labor relations and has violated the expressly stated intention of Congress that the operation of the nation's urban mass transit systems should be left to local management and control. As the First Circuit has recently recognized, such a dramatic result cannot be read into Section 13(c) absent a clear indication that Congress intended to so federalize local public employee labor relations in the mass transit field. *Local Division 589, A.T.U. v. Commonwealth of Massachusetts,* No. 81-1180 (1st Cir. 1981), Slip. Op. at 32-33. No such legislative intent may be found in this case.

To the contrary, Congress recognized that local control of mass transit operations was and remains of critical importance to the successful provision of such services to local communities. 49 U.S.C. §§ 1601(b), 1601a, 1607(a), 1608(d). Since World War II, the cost of providing mass transit services in the nation's urban areas has increased markedly as a result of general inflation, the rising costs of fuel and equipment and, in particular, increased labor costs.[1] By the early 1960's, the financial stability, if not solvency, of many of the nation's urban mass transit systems was in serious question. It is this consideration,

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1. Comptroller General Report to Congress, "Soaring Transit Costs Must Be Controlled" 9-10, 13 (February 1981).

more than any other, that inspired the enactment of the Urban Mass Transportation Act of 1964. 49 U.S.C. §§ 1601(a)(3), 1601a, 1601b(4), (5) and (7). Because the forces which have steadily increased the cost of mass transportation services have remained unabated in recent years, many mass transit systems find themselves today in increasingly serious financial difficulty. Indeed, as noted in APTA's initial brief to this Court, such financial problems have resulted during recent months in an unprecedented three-month shutdown of the system in Birmingham, Alabama,[2] major fare increases in Chicago, Illinois,[3] and many other cities, and emergency State approriations in Boston, Massachusetts.[4]

The local public transit agencies which comprise the majority of APTA's voting members are vested with the primary responsibility for controlling such costs. In light of the varied mass transit needs of each community, and the particular sociological, economic and political contexts in which these needs are addressed, it is imperative that these local public transit agencies have the flexibility to devise specific solutions to specific local problems without the imposition of federal control or the imprimatur of federal review and approval by the courts. Local control of mass transit services, therefore, as Congress itself recognized, is the most appropriate operating form for a local public transit agency.

It bears repeated emphasis that in light of the number of 13(c) agreements entered into by local transit agencies throughout the nation, and certified as fair and equitable by the Secretary of Labor, the impact of the Sixth Circuit's decision upon the nation's public transit systems and upon an already overburdened federal judiciary will clearly be substantial. Moreover, by its recognition

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2. New York Times, at 1 (July 2, 1981).
3. *Ibid.*
4. *Local Division 589, A.T.U. v. Commonwealth of Massachusetts*, 511 F. Supp. 312 (D. Mass. 1981), vacated and remanded, No. 81-1180 (1st Cir. 1981).

of a body of federal labor law that could supersede State and local public employee law, the Sixth Circuit's instant decision departs even further from the intended meaning and purpose of the Urban Mass Transportation Act than previously reported cases involving Section 13(c). The proliferation of litigation involving Section 13(c), and potentially involving the many other provisions of the Act, will have disastrous consequences upon local public transit agencies, and the public they serve. A decision in such fundamental error must be reversed.

INTRODUCTORY STATEMENT

Congress enacted the Urban Mass Transportation Act of 1964 in response to a serious and increasing financial crisis in the provision of mass transit services to the nation's urban centers. 49 U.S.C. § 1601(a). Recognizing the threat to the general welfare of the nation's cities resulting from the deterioration and inadequate provision of mass transit services, and concluding that federal financial assistance was essential to any solution of the problem, § 1601(a), Congress designed a federal assistance program so as to provide for the development of mass transportation facilities, equipment, techniques and methods, § 1601(b)(1), encourage the establishment of areawide mass transit systems, § 1601(b)(2), and supplement State and local financial support of such systems. §§ 1601(b)(3), 1604(f).

Although a second discussion of the specific nature and operation of this Act is unnecessary, certain points touched upon in APTA's earlier brief bear renewed emphasis.

First, based upon its recognition of the uniquely local nature of the provision of urban mass transit services, Congress provided that transit systems receiving federal assistance were to be locally managed and operated "as determined by local needs," § 1601(b)(3), and prohibited the federal government from regulating "in any manner the mode of operation of any mass transportation

system." § 1608(d). Indeed, Congress required the federal government to cooperate with local communities receiving assistance under the Act, § 1607(a), and further emphasized that primary responsibility for the provision of mass transit services was left to the "initiative" of the States and local communities:

> "It is the purpose of this Act to create a partnership which permits the local communities, through Federal financial assistance, to exercise the initiative necessary to satisfy its urban mass transportation requirements." § 1601(a).

Indeed, the First Circuit expressly recognized that in drafting the Urban Mass Transportation Act, Congress was aware of and sensitive to the inherently local nature of urban mass transit services. *Local Division 589, A.T.U. v. Commonwealth of Massachusetts, supra,* Slip. Op. at 34-35.

Second, Section 13(c) of the Act, 49 U.S.C. § 1609(c) is but one of numerous conditions of grant approval, a number of which require the grant recipient to provide a measure of protection to other persons or interests, in addition to labor, such as private transportation companies, charter and school bus operations, and elderly, handicapped or displaced persons. See, *e.g.*, §§ 1602(a)(2)(A), 1602(a)(3), 1602(e), 1602(f), 1602(g), 1604(l), 1604(m), 1606, 1607, 1609(c). Significantly, with respect to *none* of these interests, including labor, did Congress even allude to the existence of federal subject matter jurisdiction or a private right of action to enforce any purported federal right under the Act.

Third, by its express terms, Section 13(c) requires only that the Secretary of Labor certify that certain arrangements, made by a grant applicant as one condition of assistance under the Act, fairly and equitably protect the interests of local transit employees affected by the grant. The statute, however, does not require or provide for any further federal involvement with respect to these

arrangements. Moreover, although the statute designates certain subject categories to be addressed by these arrangements, it leaves the specific terms and conditions of any such arrangement to the grant applicant. Indeed, Congress expressly intended that these arrangements would be the "product of local bargaining and negotiation. . . ." S. Rep. No. 82, 88th Cong., 1st Sess., Banking and Currency Committee 28 (1963).

Any understanding of the Urban Mass Transportation Act and, in particular, Section 13(c) of the Act, must proceed in light of these principles.

In its instant brief, APTA will again address the legislative history of Section 13(c) in order to demonstrate the fundamental error in respondent's contention, set forth in its opposition to APTA's brief in support of the petition, that Congress intended by certain minor changes in the wording of the proposed statute to preempt State and local public employee law, notwithstanding the carefully expressed and repeated assurances to the contrary of the sponsors of the provision in both houses of Congress. Additionally, APTA will elaborate upon its prior analysis and further explain that, under the principles and method of analysis set forth by this Court in *Cort v. Ash*, 422 U.S. 66, 78 (1975) and its recent cases, no basis exists upon which to infer that Congress intended to create a private federal remedy under Section 13(c).

As APTA will show, Congress clearly did not intend to create, and certainly did not intend the judiciary to create, a substantive body of federal law under Section 13(c) that would supersede State public employee law. No "national labor policy" supports an inference of federal subject matter jurisdiction or a private federal remedy under the Act. The Sixth Circuit's instant decision is fundamentally in error and should be reversed.

ARGUMENT

I. Congress Did Not Intend That Section 13(c) of the Urban Mass Transportation Act Would Serve to Preempt or Supersede State or Local Public Employee Law.

In its original brief in support of the Petition for Certiorari herein, APTA set forth extensively the legislative history of Section 13(c). Careful analysis of that history unmistakably reveals that the statute was conceived by its own sponsors to be entirely "ancillary" to the main purpose of the Act, 109 Cong. Rec. 5417 (Remarks of Sen. Williams), i.e., to provide financial assistance to local public transit agencies, and that by its inclusion in the Act, neither house of Congress intended Section 13(c) or arrangements made thereunder to serve to preempt State law. Space limitations preclude repetition of that discussion of the legislative history; for that analysis, APTA respectfully refers the Court to pages 7 through 13 of its original brief.

Indeed, in *Local Division 589, A.T.U. v. Commonwealth of Massachusetts, supra,* the only decision construing Section 13(c) in which a Court has given due consideration, or indeed any meaningful consideration, to the legislative history of Section 13(c), the First Circuit exhaustively reviewed the history of the statute, and reached precisely the same conclusion that APTA has argued to this Court:

> "Our examination convinces us that Congress intended State law, not § 13(c) assurances, to prevail in case of a conflict.
>
> . . .
>
> A careful examination of the legislative history reveals no evidence of any intent that a § 13(c) assurance supersedes State law; rather, that history reveals the contrary."
> Slip. Op. at 20.

In response to the clear light cast upon Section 13(c) by its legislative history, respondent first argues, somewhat ambiguously, that APTA essentially contends that "the federal law" cannot be

enforced. APTA, of course, does not here contend that there is no method by which to effectuate Section 13(c), and, by its discussion of the legislative history of the statute, APTA did not address that question. APTA does contend, however, that Congress did not intend to create a *federal* private right of action to enforce essentially local arrangements made under the statute. Moreover, as part of its analysis of the private right of action issue the Sixth Circuit purported to analyze this history and unequivocably, albeit erroneously, concluded:

> "It is indisputable that Section 13(c) reflects *national* labor policy. . . . Senator Morse . . . assured his colleagues that state laws forbidding public employee strikes would supersede national labor policy, but only where the right to strike was concerned; *all other* collective bargaining right would be protected." 650 F.2d at 1385; Appendix at 12a (emphasis in original).

The Sixth Circuit's analysis of the remedy issue, therefore, also clearly presents to this Court the question of Congress' intent, or lack of intent, to preempt State or local public employee law.

In an effort to avoid the import of the clear legislative history of the statute, respondent essentially asserts that despite earlier statements made in the Senate or during the Committee hearings by Secretary of Labor Wirtz that Section 13(c) was not intended to preempt State law, Section 13(c)(2) was significantly amended by Senator Morse so as to in fact demonstrate an ultimate Congressional intent to preempt State law. Respondent's contention is without merit.

First, respondent attempts to evade the unmistakable import of the initial Senate debates by contending that the clear statements of the sponsors of Section 13(c) to the effect that the statute was not intended to preempt State law must be understood to have meaning only in relation to the use of the word "encouragement" in subsection 13(c)(2), which was subsequently deleted by the Morse amendment. As the debates themselves reveal, how-

ever, Congress was in fact concerned with the legal effect of the entire statute and focused, if at all, principally upon the legal necessity of including an express disclaimer of an intent to preempt State law. 109 Cong. Rec. 5414-5420.

That the Senate was concerned with the legal impact of the entire statute is illustrated by its consideration of a second amendment to the provision offered by Senator Tower. On April 2, 1963, following the defeat of his attempt to delete the labor provision from the bill, Senator Tower proposed to amend Section 13(c) *in its entirety* so as to require that the "fair and equitable arrangements" made under the statute be "consistent with the laws of the State in which the project or a portion of the project is located." *Id.* at 5421. Senator Williams, however, a principal sponsor of the Act and of the amendment subsequently introduced by Senator Morse, opposed the Towers amendment, and the amendment was thereafter defeated, not on the ground that it changed the meaning of the provision, but on the ground that it was "unnecessary." *Ibid;* see also, *Local Division 589, A.T.U. v. Commonwealth of Massachusetts, supra,* Slip. Op. at 29-30. Respondent's contention that Congress understood the preemptive effect of Section 13(c) to turn upon the inclusion or exclusion of the word "encouragement" in Section 13(c)(2) is simply wrong.

Second, contrary to respondent's principal contention, Senator Morse made clear that his amendment to subsection (c)(2) so as to delete the word "encouragement" would not serve to preempt State law or policy in the making of the Section 13(c) arrangements. Indeed, notwithstanding its reliance upon this amendment to Section 13(c), respondent misconstrues the question presented to Congress. The question was not, as respondent would have it, whether Section 13(c) required or merely encouraged the continuation of collective bargaining rights, but whether those collective bargaining rights prohibited or limited by State law with respect to public employees, such as a right to strike or to a union or agency

shop, were required by Section 13(c) to be continued regardless of such State law or policy. As noted, Senator Morse made very clear that the statute did not preempt state law.

Thus, following the introduction of Senator Morse's amendment, Senator Goldwater questioned Senator Morse directly as to whether Section 13(c), as amended, was intended to preempt State law defining the rights of public employees.

> "MR. GOLDWATER: My fear is that if there were a State law which prohibited a strike against any segment of government, the language would preempt that State law.
> MR. MORSE: For the purpose of establishing the legislative history, . . . that . . . is not the intention of this language." 109 Cong. Rec. 5672.

Senator Goldwater then posited a circumstance in which a private transit company, which was a party to a collective bargaining agreement permitting employees to strike, is taken over by a public agency. Senator Goldwater questioned Senator Morse as to whether Section 13(c) would require that the right to strike "would continue under the new arrangement . . .?" *Ibid.* In language seized upon by the Sixth Circuit, Senator Morse replied:

> "If there should be such an acquisition . . . and if there were a State law which prevented public employees from striking, they could not then strike. They would then have all their other rights, but not the right to strike." *Ibid.*

In language ignored by the Sixth Circuit, however, Senator Morse further explained the principle that State law would prevail over purely contractual rights:

> "The public agency would still have the obligation to carry out all the collective bargaining obligations of the contract; but if State law forbade a strike against a municipality *of course the union would be bound by the State law.*"
> *Id.* at 5673; emphasis added.

Senator Goldwater then reposited his hypothetical and again questioned whether Section 13(c), regardless of State law, would require the preservation of a right to strike contained in a private labor agreement. In language substantially edited by respondent, Senator Morse replied:

> "In that case, the State law would supervene. The rights we are talking about are those spelled out in the collective bargaining agreement. . . . This has nothing to do with the right to strike. *In this sense, the right to strike is not a part of the collective bargaining agreement. The State law would be controlling, because a strike would be contrary to the public policy as established by the paramount State law. . . .* My amendment does not affect any application made by a public agency operating under such a State policy."
> *Ibid;* emphasis added.

Following a discussion in which Senator Morse assured Congress that the Taft-Hartley Act (NLRA) did not apply to local public agencies through the operation of Section 13(c),[5] Senator Goldwater questioned Senator Morse as to the intended preemptive effect of Section 13(c) on State law. Senator Morse's response is dispositive of the issue.

> "MR. GOLDWATER: Then is it the opinion of the Senator from Oregon [Morse] that this language in no way should supersede State law?
> MR. MORSE: Yes, as to the right to strike.
> MR. GOLDWATER: How could it not supersede State law as to the right to strike, but could supersede other law?
> MR. MORSE: That is perfectly clear. *The amendment does not supersede any State policy. . . .*"
> *Ibid;* emphasis added.

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5. Respondent argues that the entire dialogue between Senators Goldwater and Morse applied only to subsection (c)(1) of the proposed statute and concerned only whether this subsection would "apply the NLRA, whole cloth, to the states." APTA respectfully submits that a reading of the debate reveals respondent's contention to be utterly lacking in merit.

Finally, in a colloquy directly relevant to both the preemption and private right of action issues, Senator Goldwater questioned Senator Morse specifically with respect to the preemptive effect of the language of Section 13(c) before and after the Morse amendment. Senator Morse not only again restated the distinction between contract rights and State public employee law and policy, but the Senator also expressly stated that any question regarding the rights available to local public employees would be determined by the State courts.

> "MR. GOLDWATER: Then, as final word, the language proposed by the Senator from Oregon [Morse] or the language of the bill as it now stands in no way would preempt State law?
>
> MR. MORSE: *The answer is yes.* . . . If the collective bargaining should be taken over by a public agency . . ., the right to strike against the public agency would be taken away from labor. *But that is not a contractual right.* . . .
>
> * * *
>
> MR. GOLDWATER: If there is local law, the language of the Senator from Oregon would not prevail.
>
> MR. MORSE: The Senator is correct.
>
> MR. GOLDWATER: If there is not a local law, would it be the interpretation of the Senator from Oregon that employees could strike in spite of the language in the 'definitions' clause of the Taft-Hartley Act?
>
> MR. MORSE: *In the absence of any local law, it would be for the State court to decide whether they had that right.*" *Id.* at 5674; emphasis added.

The Senate debates surrounding the enactment of Section 13(c), therefore, demonstrate conclusively that Congress did not intend that State and local public employee law would be preempted by Section 13(c) as a condition of grant approval. Astoundingly, in an apparent attempt to create a unicameral

form of government, respondent argues that the debates in the House of Representatives the following year regarding Section 13(c) should be ignored by this Court. The motive for respondent's assertion is manifest, for the statements made by the sponsors of the Act and of Section 13(c) in the House even more clearly evidence the intent of Congress not to preempt State law or policy in the making of the arrangements under Section 13(c). See, APTA brief at 11-13. The Sixth Circuit's erroneous conclusion to the contrary, upon which it based its inference of a private federal remedy under Section 13(c), should be reversed.

II. Congress Did Not Intend to Create a Private Federal Remedy Under Section 13(c) of UMTA.

A. THE TEST SET FORTH IN CORT V. ASH AND SUBSEQUENT SUPREME COURT CASES DETERMINES WHETHER A PRIVATE RIGHT OF ACTION MAY BE INFERRED UNDER SECTION 13(C).

In its attempt to demonstrate that a private right of action exists under Section 13(c) of the Urban Mass Transportation Act, notwithstanding the absence of any indication in either the statute or its legislative history that Congress intended to create such a remedy, respondent argues that the test set forth in *Cort v. Ash*, 422 U.S. 66 (1975) is inapplicable because a party to a "federal statutory agreement" may always state a claim under that agreement invoking the jurisdiction of the federal courts. Notwithstanding that the existence of federal subject matter jurisdiction and the inference of a federal private right of action are distinct and independent issues, *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979), respondent's contention lacks any merit.

Less than a year ago, this Court affirmed that *Cort v. Ash* articulated "a preferred approach for determining whether a private right of action should be implied from a federal statute." *California v. Sierra Club*, ... U.S. ....., 68 L.Ed. 2d 101, 107 (1981). Indeed, during this same term, in *Universities Research Assn. v. Coutu*, ... U.S. ....., 67 L.Ed. 2d 662 (1981), this Court

applied the *Cort* analysis to the Davis-Bacon Act, 40 U.S.C. § 276a *et seq.*, a labor statute providing for minimum wages in federal public building and works contracts, and concluded that the Act did not establish a federal private right of action in connection with a federal contract that had been administratively determined not to involve Davis-Bacon work.

The cases upon which respondent relies in support of its contention that *Cort v. Ash* is inapplicable to an analysis under Section 13(c) fail to support its position. In each of these cases—which are the very decisions involving the implication of a private federal remedy under Section 13(c) that, together with the decision of the Sixth Circuit, are put at issue in this proceeding—the Court, rather than rejecting *Cort*, either itself applied *Cort* or relied upon cases that applied *Cort* in considering the private remedy question there at issue.[6]

Finally, respondent also expansively asserts that *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11 (1979), proclaims the broad principle that a "federal contractual scheme," whatever that might be, is *per se* enforceable in federal court, rendering a *Cort* analysis superfluous. Transamerica, however, stands for no such principle.

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6. See, *Local Division 519, A.T.U. v. LaCrosse Municipal Transit Utility*, 585 F.2d 1340 (7th Cir. 1978), relying upon *International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963), which was decided 12 years before *Cort*, and *McDaniel v. University of Chicago*, 548 F.2d 689 (7th Cir. 1977); *Local Division No. 714, A.T.U. v. Greater Portland Transit District*, 589 F.2d 1 (1st Cir. 1978); and *Division 1287, A.T.U. v. Kansas City Area Transportation Authority*, 582 F.2d 444 (8th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979). In the instant case, of course, although the Sixth Circuit applied *Cort* in its analysis of the issue, it inferred a private federal remedy, contrary to the dictate of this Court, based upon its judgment that such a remedy would be appropriate.

Amicus also respectfully submits that, notwithstanding their use of *Cort*, the Courts in the above cited cases erroneously analyzed the Urban Mass Transportation Act in light of the principles set forth in that case, especially as these principles have been illuminated in this Court's most recent pronouncements on the issue.

In the first place, not only did *Transamerica* expressly rely upon *Cort* and subsequent cases which utilized a *Cort* analysis, such as *Touche Ross & Co. v. Redington,* 442 U.S. 560 (1979) and *Cannon v. University of Chicago,* 441 U.S. 677 (1979), but this Court there held that the key question in *each* case concerning an implication of a private federal remedy, "what must ultimately be determined, is whether Congress intended to create the private remedy asserted. . . ." 444 U.S. at 15-16.

Secondly, as to respondent's "federal contractual scheme" contention, *Transamerica* stands only for the limited proposition that where Congress has *explicitly* declared a certain type of contract provision void, as it did in Section 215 of the Investment Advisors Act of 1940, 15 U.S.C. § 80b-15, Congress intended to permit the limited and "customary legal incidents of voidness," i.e., actions for rescission, injunction or restitution. *Id.* at 18-19. Conversely, the Court also refused to imply a private right of action for damages under Section 206 of that Act, 15 U.S.C. § 80b-6, which proscribed certain fraudulent and deceptive conduct by investment advisors, on the ground that Section 206 merely proscribes conduct and does not "by its terms create or alter any civil liabilities." *Id.* at 19. *Transamerica,* therefore, neither stands for or in any way supports the broad ranging principle asserted by respondent, nor sanctions a radical departure from a proper analysis of Congressional intent under the principles of *Cort v. Ash.*[7]

In this case, Section 13(c) of the Urban Mass Transportation Act also does not "by its terms create or alter civil liabilities;" it requires only that certain arrangements, which need not even be contractual in nature, be made by the grant recipient as a condition of grant approval. Any rights or obligations encom-

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7. As indicated above, this Court has recently affirmed the viability of the *Cort* analysis in *California v. Sierra Club, supra,* ..... U.S. ....., 68 L.Ed.2d at 107.

passed by a 13(c) arrangement are created by the parties to the arrangement—the local agency and, possibly, the local union—not by Section 13(c) itself. By its terms, therefore, Section 13(c) neither creates nor alters any rights. Because the legislative history of Section 13(c) also weighs heavily against any implication of a federal private right of action against local public transit agencies, the principles set forth in *Transamerica* in fact bar any inference of a private federal remedy in the instant case.

B. THE PRINCIPLES SET FORTH IN CORT V. ASH AND SUBSEQUENT SUPREME COURT CASES DO NOT SUPPORT AN INFERENCE THAT CONGRESS INTENDED TO CREATE A FEDERAL PRIVATE RIGHT OF ACTION UNDER SECTION 13(C).

As APTA has previously discussed, the Sixth Circuit, following the decision of the Seventh Circuit in *Local Division 519, A.T.U. v. LaCrosse Municipal Transit Utility, supra,* 585 F.2d 1340, 1349-1350, based its inference of a federal private right of action under Section 13(c) principally upon its belief that such a remedy for an alleged breach of a 13(c) agreement would be appropriate. 650 F.2d at 1384; Appendix at 8a-9a.

In so doing, both Circuits lost sight of the fundamental inquiry required by this Court, the ascertainment of a Congressional intent to create a private federal remedy. As the Sixth Circuit explicitly recognized, nowhere in the language or legislative history of the Urban Mass Transportation Act does Congress indicate that it intended to create a private federal right of action under Section 13(c). 650 F.2d at 1384; Appendix at 8a. Indeed, nowhere does Congress refer to any enforcement mechanism for arrangements made pursuant to Section 13(c) and, of course, the statute itself establishes no such mechanism.

In its very conception of the issue, therefore, the Sixth Circuit violated the fundamental caveat repeatedly emphasized by this Court.

> "[W]hether a statute creates a private right of action is ultimately 'one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.' "

Universities Research Assn. v. Coutu, supra, ... U.S. ...., 67 L.Ed. 2d 662, 675, quoting *Touche Ross & Co. v. Redington, supra,* 442 U.S. 560, 578.

> "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."

California v. Sierra Club, supra, ... U.S. ...., 68 L.Ed. 2d 101, 110. See also, *Transamerica Mortgage Advisors v. Lewis, supra,* 444 U.S. 11, 15-16.

Although the Sixth Circuit did not expressly conclude that an analysis of the issue under the principles set forth in *Cort v. Ash* was "unnecessary," as did the Seventh Circuit, 650 F.2d at 1384; Appendix at 9a; see, *LaCrosse,* 585 F.2d at 1350, it considered *Cort* only to "reinforce" its conclusion that a federal private right of action should be inferred under Section 13(c). *Ibid.* In any case, the Sixth Circuit's analysis of the Urban Mass Transportation Act in light of *Cort* is fundamentally in error.

This Court has repeatedly emphasized that whether a private federal remedy will be deemed to exist under a given statutory scheme turns ultimately upon the intent of Congress. *Transamerica Mortgage Advisors, Inc. v. Lewis, supra,* 444 U.S. 11, 15-16, 23-24; *Touche Ross & Co. v. Redington, supra,* 442 U.S. 560, 578. Combined, the four factors set forth in *Cort v. Ash* constitute the relevant inquiries in any determination or analysis of such Congressional intent. *California v. Sierra Club, supra,* .... U.S. ...., 68 L.Ed. 2d 101, 107. APTA respectfully submits that such an analysis in this case compels the conclusion that Congress did not intend to create a private federal remedy under the Urban Mass Transportation Act. At the very least, in the

face of the utter silence of both the Act and its legislative history on the issue, save for Senator Morse's statement affirmatively indicating the *absence* of a private federal remedy, 109 Cong. Rec. 5674, it cannot affirmatively be said that Congress did intend to create such a remedy.

1. Local Transit Employees Are Not the Especial Beneficiaries of the Urban Mass Transportation Act.

Cort first asks whether the plaintiff belongs to a class "for whose *especial* benefit the statute was enacted, . . . that is, *does the statute create a federal right in favor of the plaintiff?*" 422 U.S. 66, 78 (emphases the Court's and added, respectively; citation omitted). In this case, as discussed in APTA's earlier brief to this Court, the Urban Mass Transportation Act was not intended to *especially* benefit either unions or labor, but focuses exclusively upon the rejuvenation of the nation's ailing urban mass transit systems.[8] Indeed, these specific purposes of the Act are expressly and extensively set forth in the statute itself. 49 U.S.C. §§ 1601, 1601a, 1601b. The Act reveals no congressional intent to especially benefit labor or any other special interest mentioned in the Act.

Moreover, that the arrangements made under Section 13(c) may inure to the benefit of labor is clearly insufficient to establish a basis for inferring a private right of action. "The question is not simply who would benefit . . ., but whether Congress intended to confer federal rights upon these beneficiaries." *California v. Sierra Club, supra,* ..... U.S. ....., 68 L.Ed. 2d 101, 108.

Neither plaintiff nor its members are *especial* beneficiaries of the Urban Mass Transportation Act, because Section 13(c) confers no rights directly upon transit employees. By its express language, the statute requires only that a grant recipient make fair and equitable arrangements, which need not even be con-

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8. Of course, when interpreting any statute, the Court must look to the law as a whole, to its entire object and policy, rather than to any isolated part.. *Pennhurst State School and Hospital v. Halderman,* ..... U.S. ....., 67 L.Ed.2d 694, 708 (1981); *International Assn. of Machinists v. Central Airlines, Inc.,* 372 U.S. 682, 686-687 (1963).

tractual in nature, *Local Division 714, A.T.U. v. Greater Portland Transit District, supra,* 589 F. 2d 1, 12, to protect certain interests of affected employees and that the Secretary of Labor certify these arrangements as such as a condition of grant approval. However they might be benefited, in the contemplation of Congress these employees are but passive beneficiaries of arrangements, contractual or otherwise, made by the grant recipient. As this Court stated in *Coutu* with respect to the Davis-Bacon Act:

> "Section 1 of the Davis-Bacon Act requires that certain stipulations be placed in federal construction contracts for the benefit of mechanics and laborers, *but it does not confer rights directly on those individuals.* Since Section 1 is simply phrased as a directive to federal agencies engaged in the disbursement of public funds . . . *its language provides no support for the implication of a private remedy.*" 67 L.Ed. 2d 662, 676-677 (emphasis added; citation omitted).

See also, *Osborn v. American Association of Retired Persons,* 660 F. 2d 740, 743 (9th Cir. 1981), in which the Ninth Circuit recently emphasized that an "express conference of federal rights by the statutory language is necessary . . . ." *Id.* at 743 n.1.

No such conferment may be found in the language of Section 13(c) or its legislative history. Local transit employees are not *especial* beneficiaries of an Act that was principally designed to provide needed financial assistance to local public transit agencies in the nation's urban centers.

2. There Is No Evidence of Any Congressional Intent to Create a Federal Private Right of Action to Enforce a 13(c) Agreement.

Second, *Cort* asks whether there is any indication or evidence of legislative intent to create a private right of action. 422 U.S. at 78. As respondent must concede, both the express language and legislative history of Section 13(c) are virtually silent as to the means of enforcement either of the rights, if any, created by the statute or of the terms of the arrangements made by a local public transit agency pursuant to Section 13(c). Indeed, in the

sole reference in the legislative history to any method of enforcement, quoted above, Senator Morse, a principal sponsor of the labor provision, expressly stated that any such dispute respecting the rights and obligations of the parties under a 13(c) arrangement would be decided in State, not federal, court. 109 Cong. Rec. 5674.

Moreover, the implication of a private federal remedy under Section 13(c) would directly conflict with the clearly revealed intent of the 88th Congress to vest responsibility for the operation of local transit services in the local agencies and, in particular, to defer to local public employee law in the making of the 13(c) arrangements. In enacting the Urban Mass Transportation Act, Congress intended to provide financial assistance to local public transit entities, but expressly prohibited the federal government from regulating "in any manner" the operation of a mass transit system, § 1608(d), required the federal government to cooperate with local communities receiving assistance under the Act, § 1607(a), and further emphasized that the primary responsibility and initiative for the provision of necessary mass transit services was to be left to the states and local communities. § 1601a.

In the face of this express evidence of Congressional intent, an implication of a federal private right of action to adjudicate disputes over the terms of essentially local arrangements and agreements would constitute an unwarranted perversion of the intent of Congress. Indeed, such an inference would be necessarily predicated upon the very fashioning of a federal common law of labor relations in the local public transit arena, especially with respect to remedies for the enforcement of alleged rights arising out of such relations, that the Court has, in other contexts, strongly held to be improper. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, ... U.S. ....., 68 L.Ed. 2d 500, 509, 511-512 (1981).

In this case, the lack of any evidence of legislative intent upon which to infer a private right of action under Section 13(c) is aptly illuminated by the Rail Passenger Service Act of 1970 (RPSA), 45 U.S.C. § 501 *et seq.*, in which Congress found it necessary to expressly create a private right of action for employees so as to permit the enforcement of "fair and equitable arrangements" made pursuant to Section 405 of that Act, 45 U.S.C. § 565. The principal purpose of the Rail Passenger Service Act was to revitalize and save from extinction the nation's deteriorating intercity railroad passenger services and to provide for the creation of a modern, efficient and integrated national rail passenger system. 45 U.S.C. § 501; *City of Philadelphia v. Baker*, 508 F. 2d 279, 282 (3d Cir. 1975), *cert. denied*, 422 U.S. 1042 (1975); *Quincy College, Etc. v. Burlington Northern, Inc.*, 328 F. Supp. 808, 810 (N.D. Ill. 1971), *affirmed*, 405 U.S. 906 (1972). In order to achieve this goal, Congress did not choose merely to provide financial assistance, such as constituted the key remedial mechanism of the Urban Mass Transportation Act, but chose to create a federal corporation, now known as Amtrak, 45 U.S.C. § 541, a private for-profit common carrier subject to the Interstate Commerce Act, § 546, with broad powers to own, manage, operate and contract for the provision of intercity rail passenger services. § 545.

In connection with railroad mergers subject to the RPSA, Congress established a number of labor protections in Section 405 of that Act. Significantly, in language substantially similar to that of Section 13(c), one of these protections requires, as a condition of contract approval, that a railroad "provide fair and equitable arrangements," as determined by the Secretary of Labor, "to protect the interests of employees," including, among others:

> "provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights . . . ." § 565(a) and (b).

Notwithstanding that the RPSA clearly contemplates far more extensive federal involvement in interstate transportation services and, under Section 405, more extensive protection of labor than the Urban Mass Transportation Act, Congress found it necessary in Section 307 of the RPSA, 45 U.S.C. § 547, to *expressly* confer a federal private right of action upon employees so as to enable them to enforce terms and conditions of a labor agreement entered into under Section 405. Thus, in the event Amtrak or a railroad engages in any actual or threatened breach of such a contract:

> "the district court of the United States . . . shall have jurisdiction . . . in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate . . . ." § 547(a).

Moreover, not only the statute, but the legislative history of Section 405, upon which this Court has relied, also explicitly reflects Congress' concern that, under that Act, an express remedy be afforded to employees so as to "permit such individuals to seek judicial relief." See, *National Railroad Passenger Corp. v. Passengers Assn.*, 414 U.S. 453, 458-461 (1974).

No such concern or express grant of jurisdiction and a private right of action may be found in either the language or legislative history of the Urban Mass Transportation Act. To the contrary, the statements of Senator Morse affirmatively indicate that no private federal remedy was contemplated. 109 Cong. Rec. 5674. As this Court has expressly recognized, in such a circumstance there is no basis upon which to infer the existence of a remedy that Congress did not itself create. *Texas Industries, Inc. v. Radcliff Materials, Inc., supra,* .... U.S. ...., 68 L.Ed. 2d 500, 512. No private right of action, therefore, may be inferred to exist under Section 13(c) of the Urban Mass Transportation Act.

3. The Preceding Analysis of Section 13(c) Under Cort v. Ash Is Dispositive. In Any Case, Analysis of Section 13(c) Pursuant to the Final Two Cort Factors Further Demonstrates that Congress Did Not Intend to Create a Private Federal Remedy For An Alleged Breach of a 13(c) Agreement.

As this Court has made clear, if, as in this case, an analysis of the first two *Cort* factors reveals no evidence of a Congressional intent to create a federal private right of action, further inquiry into whether the purpose of the statute would be advanced by the implication of such a remedy or whether the subject matter of the alleged cause of action is one traditionally relegated to State law is unnecessary. *California v. Sierra Club, supra,* .... U.S. ...., 68 L.Ed. 2d 101, 110; *Touche Ross & Co. v. Redington, supra,* 442 U.S. 560, 575-576.

As the preceding analysis has shown, Congress did not intend to confer federal rights directly upon local transit employees so as to render them especial beneficiaries of the Urban Mass Transportation Act; nor is there any evidence in the statute or its legislative history upon which to base an inference that Congress intended to create a private federal remedy under the Act. Indeed, there is abundant evidence in the Act, its legislative history and in subsequent Acts of Congress to the contrary.

As APTA has previously discussed, however, consideration of the final two *Cort* factors further confirms that Congress did not intend to create a private federal remedy.

First, the principal and overriding purpose of the Act was to provide *supplemental* assistance to local public transit agencies in the nation's urban centers. 49 U.S.C. §§ 1601, 1604(f). Although federal resources were to be made available for this purpose, Congress expressly prohibited federal involvement in the operation or management of these local agencies. §§ 1601(b)(3), 1601a, 1607(a) and 1608(d). As discussed above, this policy reflects a recognition by Congress that local control of mass transit services is needed in order to even attempt to retain control over the increasing costs of such services. The imposition of federal review of local public transit operations,

however, will necessarily diminish local control over the provision of such services and may thereby increase service costs and contribute to possible service cutbacks. Such a result, which would be directly contrary to the fundamental purpose of the Urban Mass Transportation Act, weighs heavily against the implication of a federal private right of action. *Universities Research Assn. v. Coutu, supra,* ..... U.S. ....., 67 L.Ed. 2d 662, 682-683; *Securities Investor Protection Corp. v. Barbour,* 421 U.S. 412, 421-423 (1975).

Finally, it cannot be seriously disputed that the resolution of disputes regarding the terms of local public employment is "traditionally relegated to state law in an area basically the concern of the States . . . ." *Cort v. Ash, supra,* at 78; *National League of Cities v. Usery,* 426 U.S. 833, 845-846 (1976); see also, Labor Management Relations Act of 1947, 29 U.S.C. §§ 152(2), 185. Moreover, in this case, the legislative history of Section 13(c) makes abundantly evident that Congress did not intend to preempt, supersede or displace state or local public employee law.

To infer a private federal remedy under Section 13(c), therefore, would be violative of the long standing Congressional deference accorded the States in the area of local public employee relations, which deference was expressly affirmed by the 88th Congress with respect to the Urban Mass Transportation Act. The Act neither requires nor encourages, indeed, it precludes, the implication of a federal private right of action such as found by the Sixth Circuit in this case.

C. NO PRIVATE FEDERAL REMEDY MAY BE INFERRED UNDER SECTION 13(C) ON THE BASIS OF EITHER THE RAILWAY LABOR ACT OR SECTION 5(2)(F) OF THE INTERSTATE COMMERCE ACT.

In an attempt to find support outside the Urban Mass Transportation Act for its claimed private federal remedy, respondent argues that Section 13(c) was based upon similar statutory pro-

visions in the Railway Labor Act, as construed by this Court in *International Association of Machinists v. Central Airlines, Inc., supra,* 372 U.S. 682, and Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 11347 (formerly, § 5(2)(f)). Respondent's reliance upon these Acts, however, is misplaced, for neither of these Acts evinces a purpose or structure even remotely analogous to those of the Urban Mass Transportation Act. Indeed, the substantial differences among these statutory schemes only serve to illuminate the lack of any basis for inferring a private federal remedy for an alleged breach of a 13(c) agreement under the Urban Mass Transportation Act.

Thus, in stark contrast to the principal purpose of UMTA to provide supplemental financial assistance to local public transit agencies, the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* (formerly, § 1 *et seq.*), sought nothing less than the establishment of a completely integrated interstate regulatory system over common carriers operating in interstate commerce so as to protect the public from unjust discrimination and preferences in the provision of services. See, e.g., *United States v. Pennsylvania R.R. Co.,* 323 U.S. 612, 618-619 (1945); *Houston, East & West Texas R.R. Co. v. United States,* 234 U.S. 342, 356 (1914). The Interstate Commerce Act manifests a Congressional policy to provide for the smooth, continuous and efficient flow of interstate traffic; accordingly, with respect to this Act, this Court has recognized:

> "National rather than local control of interstate railroad transportation has long been the policy of Congress." *Chicago v. Atchison, Etc. R.R. Co.,* 357 U.S. 77, 87 (1958).

In contrast, as discussed above, the Urban Mass Transportation Act expressly provides, and thereby manifests a clear Congressional policy, that the public transit services of the nation's urban centers be under local, not national, control. That a private right of action may exist under Section 5(2)(f), therefore, is entirely

irrelevant to whether Congress intended to create a private federal remedy under Section 13(c) of UMTA, for the scope, purpose and, in particular, the policy of the two Acts with respect to the deference due to State and local law, are entirely different.

It is inconceivable that the single, quite limited reference to Section 5(2)(f) in Section 13(c), which clearly applies only to subsection 13(c)(3) of the statute, could substitute for clear evidence in the language of the Act or its legislative history that Congress intended to create a private federal remedy under Section 13(c). Indeed, notwithstanding an identical reference to Section 5(2)(f) in Section 405 of the RPSA, 45 U.S.C. § 565(b), Congress found it necessary to create an express federal remedy for employees in Section 307 of that Act. *Id.* at § 547. No such express remedy may be found in the Urban Mass Transportation Act. Where Congress has intended to incorporate the remedies of another statutory scheme, it has done so expressly. See, *Lorillard v. Pons*, 434 U.S. 575, 577-583 (1978).[9]

Similarly, as discussed in detail in APTA's brief to this Court in support of the Petition for Writ of Certiorari, respondent's reliance upon the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, as construed by this Court in *International Association of Ma-*

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9. Respondent's reliance upon *Cannon v. University of Chicago, supra*, 441 U.S. 677, is equally misplaced. Not only was Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, patterned in large part on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, but the *express* legislative history of Title VI demonstrated that Congress understood Title VI to afford a private right of action. 441 U.S. at 699-700.

Moreover, the cases cited by respondent for the proposition that Section 5(2)(f) gives rise to a private federal remedy did not expressly examine or have occasion to examine the issue. See, *e.g.*, *Brotherhood of Locomotive Engineers v. Chicago Etc. R.R. Co.*, 314 F.2d 424, 428 (8th Cir. 1963).

chinists v. Central Airlines, Inc., supra, 372 U.S. 682, is entirely misplaced. In the first place, *Central Airlines* was wholly concerned with the issue of subject matter jurisdiction and neither addressed nor had occasion to address whether a private right of action existed under the Railway Labor Act to enforce a grievance board order. More importantly, however, unlike the Urban Mass Transportation Act, the Railway Labor Act is a comprehensive and detailed statute with a long history of nationwide regulation of labor relations in industries which, like the railroads, are centrally involved in the nation's interstate commerce, 372 U.S. at 685-692, in order to prevent interruption of the nation's commercial transportation services. *Id.* at 686-687, 689; 45 U.S.C. § 152 First. Accordingly, because the regional grievance boards involved in *Central Airlines* were expressly required by the Railway Labor Act as an integral part of a pervasive and nationwide dispute resolution mechanism designed to achieve these central purposes of that Act, this Court concluded that Congress necessarily intended the Act to be enforced by a federal law of uniform application so as to establish federal subject matter jurisdiction. *Id.* at 691-692.[10]

The Urban Mass Transportation Act, however, as the First Circuit in *Commonwealth of Massachusetts* expressly recognized, Slip. Op. at 33-34, is manifestly not a statute in any way similar to either the Interstate Commerce Act or the Railway Labor Act. UMTA is neither a comprehensive nationwide regulatory statute like the statutory schemes upon which respondent relies, nor does it have anything to do with labor save in a manner entirely "ancillary" to the main purposes of the Act. 109 Cong. Rec. 5417 (Remarks of Sen. Williams). Rather, as the Urban Mass

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10. As noted in APTA's prior brief, the applicability of the Railway Labor Act to State and local public entities may, of course, be limited by the 10th Amendment. *National League of Cities v. Usery, supra,* 426 U.S. 833; *United Transportation Union v. Long Island Railroad,* 643 F.2d 19 (2d Cir. 1981), *cert. granted,* ..... U.S. ....., 69 L.Ed. 2d 970 (1981).

Transportation Act is principally a funding statute, designed to provide desperately needed funds to struggling local public transit agencies, and enacted in large part pursuant to the Spending Power of Congress, any conditions upon a grant would be generally enforced by termination of the grant, rather than by implication of a private right of action. As this Court stated in *Pennhurst State School and Hospital v. Halderman, supra,* ..... U.S. ....., 67 L.Ed. 2d 694:

> "In legislation enacted pursuant to the Spending Power, the typical remedy for state noncompliance with federally imposed conditions is *not* a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Id.* at 714; emphasis added.[11]

In fact, the First Circuit has expressly recognized that this latter remedy, recognized by this Court in *Pennhurst,* may be available under the Urban Mass Transportation Act to enforce the terms and conditions of a grant issued under the Act. *Local Division 589, A.T.U. v. Commonwealth of Massachusetts, supra,* Slip. Op. at 36.

No basis exists in either the Urban Mass Transportation Act, its legislative history and policy, or other, distinctly different, statutory schemes upon which to base an implication of a federal private right of action. Indeed, Senator Morse affirmatively indicated exactly the opposite. 109 Cong. Rec. 5674. The decision of the Sixth Circuit is fundamentally in error and should be reversed.

D. RESPONDENT HAS NO FEDERAL PRIVATE RIGHT OF ACTION UNDER 42 U.S.C. SECTION 1983.

Respondent argues that this Court's decision in *Maine v. Thiboutot,* 448 U.S. 1 (1980), which held that 42 U.S.C. Sec-

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11. Respondent asserts that in *Pennhurst* "this Court opined that [the] language of 'condition' present here would create enforceable rights and obligations." (Opp. to Petition at 2.) *Pennhurst* makes no such statement. Indeed, in light of the passage quoted in text, respondent's characterization of *Pennhurst* is, at best, questionable.

tion 1983 authorized suits to redress violations of federal statutory rights by State officials, affords a federal private right of action under Section 13(c). Respondent's contention is without merit.

First, as discussed above, Section 13(c) confers no rights directly upon local transit employees; the statute requires only that the grant recipient make certain arrangements respecting labor as one condition of grant approval. Any rights created by a 13(c) arrangement are created by the parties to that arrangement—the local public agency and local employees—not by Section 13(c) itself. Indeed, Congress expressly intended that the terms and conditions of the arrangements would be the product of local bargaining and negotiation. S. Rep. No. 82, *supra* at 28.

Moreover, respondent's argument proves too much, for it would essentially render superfluous a private right of action analysis under any test if a State official were involved.[12] As this Court has repeatedly made clear, Congress' intent with respect to the particular statute at issue is the central inquiry in any analysis of the existence of an implied private federal remedy. *Transamerica Mortgage Advisors, Inc. v. Lewis, supra,* 444 U.S. at 15-16, 23-24; *Touche Ross & Co. v. Redington, supra,* 442 U.S. at 578.

No evidence of any such intent may be found in this case. To imply a private federal remedy under Section 1983, therefore, would contravene not only the intent of Congress under the Urban Mass Transportation Act but also the policies repeatedly articulated by this Court in its recent decisions involving the implication of private federal remedies.

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12. Indeed, in *California v. Sierra Club, supra,* ..... U.S. ....., 68 L.Ed. 2d 101, which involved a suit against State officials, among others, this Court did not seek to imply a remedy under Section 1983 notwithstanding that it held that a private right of action could not be implied under the Rivers and Harbors Appropriation Act.

III. An Alleged Breach of a 13(c) Agreement Does Not State a Claim Arising Under the Laws of the United States.

Respondent has failed to address the threshold issue asserted by both petitioners and APTA—that an alleged breach of a 13(c) agreement fails to involve any federal right so as to state a federal question sufficient to confer subject matter jurisdiction upon the Court. See, *Gully v. First National Bank*, 299 U.S. 109 (1936). APTA, therefore, will not attempt to repeat its previous arguments regarding the issue and respectfully refers the Court to its analysis of the jurisdictional issue set forth on pages 17 through 22 of its Brief in Support of Petitioner.

In closing, APTA would repeat only that the special province of the federal courts is to apply a uniform federal law only in the context of federal legislation that is genuinely comprehensive and of nationwide application. *International Assn. of Machinists v. Central Airlines, Inc., supra*, 372 U.S. 682, 691; *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). The Urban Mass Transportation Act is not such a piece of federal labor legislation, and cannot support a finding of subject matter jurisdiction to adjudicate an alleged breach of a 13(c) agreement.

CONCLUSION

For the foregoing reasons, amicus curiae American Public Transit Association respectfully requests this Court to reverse the decision of the Sixth Circuit.

January 14, 1982

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No. 81-411.

In the
Supreme Court of the United States.

OCTOBER TERM, 1981.

JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE,
PETITIONERS,
v.
LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC,
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Brief of Amicus Curiae in Support of Petitioners, Jackson Transit Authority and the City of Jackson, Tennessee, on Behalf of the Massachusetts Bay Transportation Authority.

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Questions Presented.

The MBTA will address itself to the following issues:

1. Whether or not federal court subject matter jurisdiction of contract disputes between puiblic transit authorities and their employees will, in practice, produce consistent results.

2. Whether or not federal court subject matter jurisdiction of contract disputes between public transit authorities and their employees will further the public interest in judicial economy and conservation of public financial resources.

Table of Contents.

Preliminary statement 1

Interest of the Massachusetts Bay Transportation Authority 2

Argument 4

I. Federal court subject matter jurisdiction of contract disputes between public transit authorities and their employees will, in practice, produce overlapping, duplicative and inconsistent results 4

II. Federal court subject matter jurisdiction of contract disputes between public transit authorities and their employees will not further the public interest in the conservation of public financial resources and in judicial economy 14

Conclusion 18

Table of Authorities Cited.

Cases.

City of Boston v. Massachusetts Bay Transportation Authority, 373 Mass. 819 (1977) 2, 5

Cohen v. Massachusetts Bay Transportation Authority, D.C. Mass. Civ. No. 81-791, aff'd, F.2d (1st Cir. 1981) 11n

Gallahue v. Massachusetts Bay Transportation Authority, Superior Court No. 45919 9, 10, 12, 13n

Local 589, ATU v. Commonwealth of Massachusetts, No. 81-1180 (1st Cir. September 30, 1981) 7n, 19n

Local 589, ATU v. Commonwealth of Massachusetts, 511 F.Supp. 312 (D. Mass. 1981) 11

Local 589, ATU v. Massachusetts Bay Transportation Authority, Superior Court No. 52672 13n

Local 589, ATU v. Massachusetts Bay Transportation Authority, Superior Court No. 51582 13

Lodge 264 v. Massachusetts Bay Transportation Authority, Superior Court No. 51214 12

Massachusetts Bay Transportation Authority v. Adams, Supreme Judicial Court No. 79-388 7n

MBTA Advisory Board v. Governor, Mass. Adv. Sh. 549, 417 N.E.2d 419 (1981) 9

Massachusetts Bay Transportation Authority v. Boston Safe Deposit and Trust Co., 348 Mass. 538 (1965) 2

Massachusetts Bay Transportation Authority v. Labor Relations Commission, 356 Mass. 563 (1970) 5

MBTA Advisory Board v. Massachusetts Bay Transportation Authority, Mass. Adv. Sh. 403, 417 N.E.2d 7 (1981) 8

National League of Cities v. Usery, 426 U.S. 833 (1976) 18

STATUTORY PROVISIONS.

Urban Mass Transportation Act of 1964, § 13(c) 3, 4, 6, 7, 8 et seq.

49 U.S.C. § 1609(c) 3, 4

Supreme Court Rule 36.4 1

Massachusetts Acts of 1978, Ch. 405 6, 7, 8, 10, 11 et seq.

Massachusetts Acts of 1980, Ch. 581 9, 10n, 11, 12, 13 et seq.

§ 8 9

§ 9 9

§ 12 9

Massachusetts General Laws
Ch. 149, § 178F-178N 5
Ch. 161A, § 1 et seq 2
§ 2 2n
§ 3(d) 2
§ 19 et seq. 9
§ 19 2, 5, 7
§ 19(a) 2
§ 20 9
§ 29 3, 8, 9

MISCELLANEOUS.

Digest of Employee Protections Urban Mass Transportation Act 13(c) and Rail Passenger Service Act C1 and C2, United States Department of Labor, Labor-Management Services Administration, Washington, D.C., 1980 6n
Regulations of the MBTA Board of Directors, § 1(c), 4 2

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Brief of Amicus Curiae in Support of Petitioners, Jackson Transit Authority and the City of Jackson, Tennessee, on Behalf of the Massachusetts Bay Transportation Authority.

Preliminary Statement.

The Massachusetts Bay Transportation Authority (MBTA) respectfully submits this brief as *amicus curiae* in support of the Jackson Transit Authority and the City of Jackson pursuant to Supreme Court Rule 36.4. The MBTA is a body politic and corporate and a political subdivision of the Common-

wealth of Massachusetts[1]. Its authorized law officer is Joseph H. Elcock, General Counsel.[2]

Interest of the Massachusetts Bay Transportation Authority.

The Massachusetts Bay Transportation Authority (the MBTA) is a statutorily created body politic and corporate and a political subdivision of the Commonwealth of Massachusetts formed for the purpose of developing, financing, and operating mass transportation within the seventy-nine cities and towns that comprise the MBTA district. Mass. Gen. Laws, Ch. 161A, § 1, *et seq*. The implicit mandate of the MBTA's enabling act is to provide transportation when and where public convenience and necessity require it. *Massachusetts Bay Transportation Authority* v. *Boston Safe Deposit and Trust Co.*, 348 Mass. 538, 548 (1965).

The MBTA has the power to fix officers', agents', and employees' compensation and conditions of employment. Mass. Gen. Laws, Ch. 161A, § 3(d). It has the power to bargain collectively with labor organizations representing employees of the MBTA and to enter into agreements with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions, and retirement allowances of such employees. Mass. Gen. Laws, Ch. 161A, § 19, 19a. Further, the MBTA is empowered to submit disputes with its employees to arbitration. *City of Boston* v. *Massachusetts Bay Transportation Authority*, 373 Mass. 819, 824 (1977). Twenty-eight labor organizations represent approximately 5,500 MBTA employees.

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[1] Mass. Gen. Laws, Ch. 161A, § 2 (1964).

[2] Regulations of the MBTA Board of Directors, § 1(c), 4 (as amended through May, 1981).

The MBTA is empowered and directed to apply for, and receive, federal grants for any purpose permitted under its enabling legislation. Mass. Gen. Laws, Ch. 161A, § 29. To date, the MBTA has received more than one billion dollars in federal assistance. Pursuant to the Urban Mass Transportation Act of 1964, the MBTA has, for each federal grant received, executed a so-called "13(c) agreement" with its employees. 49 U.S.C. § 1609(c) (1964). One such 13(c) agreement was executed on December 10, 1974, and it has since been the practice of the parties thereto to republish the 1974 13(c) agreement by making its terms and conditions applicable to all federal grant contracts executed since December 10, 1974.

Although the MBTA has received substantially more federal assistance than the Jackson Transit Authority, nevertheless the MBTA is in a position similar to that of Jackson in that a decision by this Court that employees of public transit authorities may enforce their collective bargaining agreements in federal courts pursuant to § 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609(c), will be binding on the MBTA and every other transit authority receiving federal transportation aid.

The MBTA has, in the last two years, been involved in a plethora of litigation with its labor organizations in both state and federal courts over matters intimately intertwined with § 13(c) of the Urban Mass Transportation Act of 1964. The MBTA supports the position of the Jackson Transit Authority and respectfully offers an account of its experiences in order to illustrate to this Court the practical consequences of a decision adverse to the Jackson Transit Authority.

Argument.

I. Federal Court Subject Matter Jurisdiction of Contract Disputes Between Public Transit Authorities and Their Employees Will, In Practice, Produce Overlapping, Duplicative and Inconsistent Results.

For more than two years, the MBTA has been embroiled in legal controversy with its unions. In both state and federal forums, and at all levels of proceedings, two Massachusetts statutes regulating MBTA labor relations which represent a significant departure from prior procedure have been and continue to be at issue. The unions maintain that the state statutes and federal labor protective provisions under the Urban Mass Transportation Act conflict and that union rights are thereby impermissibly infringed. 49 U.S.C. § 1609(c) (1964) (Section 13(c) of the Act) (hereinafter "Section 13(c)" or "13(c)," depending upon the context). Section 13(c) requires that "fair and equitable arrangements [be] made, as determined by the Secretary of Labor, to protect the interests of employees affected" by federal financial assistance. 49 U.S.C. § 1609(c) (1964). It is the unions' position that the federal court is the proper forum to decide all questions allegedly concerning 13(c), including contractual disputes arising exclusively under or over the terms of collective bargaining agreements between public transit authorities and their employees, and that public transit workers are protected by federal law against *any* unilateral state change in *any* rights previously won in collective bargaining.

The MBTA, as *amicus curiae*, herein opposes federal court subject matter jurisdiction, and any other unnecessary or excessive federal intervention, in matters of principally local interest. The following section sets forth a chronology of relevant laws and events demonstrating that federal court subject

matter jurisdiction of contract disputes between public transit authorities and their employees will, in practice, produce results contrary to the national and local public interest in finality, economy, and certainty of judicial decision.

Since 1964, labor relations between the MBTA and its employees have been governed exclusively by the provisions of its enabling legislation. Mass. Gen. Law Ch. 161A, § 19 (1964) (App. 303a). The more restrictive provisions of Massachusetts law governing labor relations between the Commonwealth of Massachusetts and most of its agency employees do not apply to the MBTA. Mass. Gen. Laws Ch. 149, § 178F-178N; *Massachusetts Bay Transportation Authority* v. *Labor Relations Commission*, 356 Mass. 563 (1970). As a result, arbitrators of disputes between the MBTA and its employees over the terms of a new agreement have enjoyed broad discretion in making awards as to the terms of new collective bargaining agreements ("interest arbitration").

Even the Advisory Board, the MBTA's statutorily created appropriating arm, has only the limited power to reduce the total amount of a wage item in the MBTA budget, not the power to determine the manner in which wage items may be allocated under the terms of a collective bargaining agreement. *City of Boston* v. *Massachusetts Bay Transportation Authority*, 373 Mass. 819 (1977). The Advisory Board may not approve or disapprove collective bargaining agreements. *City of Boston, supra*, at 825. Consequently, the Advisory Board has no direct control over controversial terms in a collective bargaining agreement such as provisions providing for automatic cost of living increases. Cost of living wage adjustments were paid to MBTA employees in 1977 and in 1978 under the terms of the collective bargaining agreements then in effect.

In July of 1978, the General Court of Massachusetts enacted Chapter 405 of the Acts of 1978 (App. 282a) (hereinafter referred to as the 1978 State Statute). The 1978 State Statute was passed following the expiration of the collective bargaining agreement but while negotiations on a new one were underway between the MBTA and Local Division 589, Amalgamated Transit Union (the "Carmen"), which union represents a majority of the Authority's employees. The 1978 State Statute changed the procedures for making collective bargaining agreements by providing for mediation to resolve impasses, and, in the event mediation fails to produce results, for interest arbitration by a single arbitrator rather than the tripartite board of arbitrators specified in the Carmen's most recently expired collective bargaining agreement. The qualifications of the single arbitrator were specified under the 1978 State Statute as were the factors upon which the single arbitrator should primarily rely in making an award. The 1978 State Statute further provided that a collective bargaining agreement reached under its statutory procedures would be binding upon the MBTA's appropriating body (the Advisory Board) as well as the parties.

The Carmen complained of this enactment to the United States Secretary of Labor, who, following the usual practice,[3] suggested that the MBTA and the Carmen should arbitrate the dispute in accordance with the provisions of the 13(c) agreement between them. An arbitration was conducted, but before any decision was rendered, the MBTA and the Carmen executed a new collective bargaining agreement on August 8,

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[3] The usual practice of the Secretary of Labor in disputes over the meaning and interpretation of "13(c) Agreements" can be found in *Digest of Employee Protections* Urban Mass Transportation Act 13(c) and Rail Passenger Service Act C1 and C2 published by the United States Department of Labor, Labor-Management Services Administration, Washington, D.C. in 1980.

1979.[4] The new agreement was inconsistent with the 1978 State Statute in that it preserved the tripartite board of arbitrators for interest arbitration and provided for cost of living adjustments based on the Consumer Price Index and not expressed in flat dollar or percentage amounts.

On August 13, 1979, a decision in the arbitration referred to in the preceding paragraph was rendered (App. 223a). The award stated:

> The July 10, 1978 amendments to Section 19 of Chapter 161A of the General Laws, and the MBTA's insistence on arbitrating interest disputes pursuant to those amendments, constitutes a conflict with the pre-existing 13(c) agreements executed by the parties.

On September 13, 1979, the MBTA filed an action in the Massachusetts Supreme Judicial Court (App. 32a) seeking to vacate the above-mentioned arbitration award and requesting a declaration that the provisions of the 1978 State Statute are binding upon the Carmen and that the 1978 State Statute is not inconsistent with (and thus does not violate) the 13(c) agreement (App. 83a) between the parties.[5] On October 15, 1979, the Carmen filed an action in the United States District Court for the District of Massachusetts, together with a Petition for Removal of the MBTA's prior state court action to the federal court (App. 11a). In their federal court action, the

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[4] That execution was approved by the General Counsel of the Massachusetts Bay Transportation Authority only to the extent not inconsistent with Chapter 405 (the 1978 State Statute). *Local 589, ATU* v. *Commonwealth of Massachusetts*, No. 81-1180 (1st Cir. September 30, 1981) (App. 116a).

[5] On February 4, 1981, the Commonwealth of Massachusetts, by the Attorney General, intervened in the MBTA's action in the Supreme Judicial Court. *Massachusetts Bay Transportation Authority* v. *Adams*, Supreme Judicial Court No. 79-388 (App. 41a).

Carmen sought a declaration that: (1) Section 13(c) requires the continuation of interest arbitration procedures set forth in the 13(c) agreement between the parties; (2) the 1978 State Statute constitutes an unconstitutional abrogation of pre-existing contractual commitments; and (3) the 1978 State Statute violates federal law. The Carmen further sought to enjoin the MBTA from refusing to comply with the arbitration award referred to hereinabove.

While these actions were pending, the Secretary of Labor, as a condition of his certification of all federal grant applications under 13(c), required the MBTA to comply with the arbitration award. In 1979, it appeared that the MBTA was empowered to comply with this requirement and, in effect, override the 1978 State Statute by a provision in its enabling legislation which provided that

> . . . It is the intent of this section that the provision of any federal law, administrative regulation or practice governing federal assistance for the purposes of this chapter shall, to the extent necessary to enable the commonwealth or its subdivisions to receive such assistance [federal grants] and not constitutionally prohibited, override any inconsistent provisions of this chapter. Mass. Gen. Laws, Ch. 161A, § 29 (before amendment).

In November of 1980, for the second consecutive year, the MBTA overran its budget. The ensuing clash of legal and political forces precipitated a crisis and a one-day shutdown of the MBTA system on December 6, 1980. *See MBTA Advisory Board* v. *Massachusetts Bay Transportation Authority*, Mass. Adv. Sh. (1981) 403, 417 N.E.2d 7 (1981) (MBTA is not authorized to exceed annual budget approved by MBTA Advi-

sory Board) (App. 265a); *MBTA Advisory Board* v. *Governor*, Mass. Adv. Sh. (1981) 549, 417 N.E.2d 419 (1981) (Governor's takeover of the MBTA to avoid shutdown in budgetary crisis not authorized under Mass. Gen. Laws, Ch. 161A § 20) (App. 277a). In order to provide the funds necessary to keep the MBTA operating until the end of 1980, the Massachusetts General Court reconvened in special session and enacted Chapter 581 of the Acts of 1980 (the "1980 State Statute"). (App. 286a) Not only did the 1980 State Statute provide the MBTA with additional funds, it also amended the MBTA's enabling legislation extensively, thereby prohibiting the MBTA from bargaining collectively and from entering into collective bargaining agreements on issues declared in the 1980 State Statute to be "inherent management rights." 1980 State Statute, Ch. 581, §§ 8, 9, amending Mass. Gen. Laws, Ch. 161A, § 19-19G. The 1980 State Statute further prohibited the MBTA from overriding inconsistent state law to procure federal grants. 1980 State Statute, Ch. 581, § 12, amending Mass. Gen. Laws, Ch. 161A, § 29 (App. 309a).

On December 24, 1980, the United States District Court for the District of Massachusetts denied the Carmen's petition for removal of the MBTA's state court action to federal court (App. 55a).

That same day the board members of twenty five and twenty eight MBTA labor organizations commenced an action in the Massachusetts Superior Court seeking to enjoin the MBTA from implementing the management rights provisions of the 1980 State Statute. *Gallahue* v. *Massachusetts Bay Transportation Authority*, Superior Court No. 45919 (App. 172a). The Superior Court initially denied injunctive relief, but, on January 7, 1981, after ordering that the unions be made parties to the action, the court issued injunctions affecting the filling of vacant positions, the assignment of employees to cover lists (layoffs) except by seniority, the hiring of part time employees, and the posting of guards (App. 180a). The injunctions were of varying duration depending upon the terms of the particular collective bargaining agreement at issue. For example, the

Carmen's collective bargaining agreement required the parties to give notice of their desire to change the terms of the agreement six months prior to its termination date. Therefore, the injunction as to the Carmen was to continue for six months, or until July 3, 1981. Similarly, since the collective bargaining agreement between the MBTA and Lodge 264, International Association of Machinists and Aerospace Workers (the "Machinists"), required two months notice of a party's desire to change the agreement, the injunction as to the Machinists was to continue for two months or until March 2, 1981. The court further provided that the injunctions would terminate earlier if any of the MBTA unions were to negotiate a new collective bargaining agreement. A petition for review of the lower court order in *Gallahue* was filed in the Massachusetts Appeals Court. The single justice declined to submit the matter for review to a full panel of the Appeals Court (App. 194a). In July, 1981 the Superior Court refused a request by the MBTA unions to extend the injunctions (App. 29a).

On February 6, 1981, the Carmen amended their complaint in federal court to include allegations challenging the 1980 State Statute on the same grounds that it had challenged the 1978 State Statute. The Carmen also sought an injunction ordering the MBTA to interest arbitration under the procedures invalidated by the 1978 State Statute.

On February 18, 1981, the Machinists moved to intervene in the Carmen's Federal District Court action seeking substantially the same relief requested by the Carmen with an additional request for an injunction against the proposed layoff of fifty-three of the Machinists.[6] As the basis of their independent

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[6]The proposed layoff of Machinists and Carmen employees was not directly related to the enactment of either the 1978 State Statute or the 1980 State Statute, but instead was a result of the reduction of some $57 million by the Advisory Board of the MBTA's 1981 operating budget. The layoffs were planned in conjunction with substantial service cuts also challenged in con-

claim the Machinists relied upon a no-layoff clause in the collective bargaining agreement between the MBTA and the Machinists which had expired on December 31, 1977. With respect to layoffs, the Carmen, on the other hand, could claim only limited protection under their collective bargaining agreement which expired on December 31, 1980.

On March 9, 1980, the District Court refused the Carmen's request for injunctive relief. However, on March 17, 1981, the District Court (1) enjoined the layoffs of the Machinists and ordered the MBTA to grievance arbitration over the propriety of the proposed layoffs and (2) ordered the Carmen and the MBTA to interest arbitration under a court-created procedure which incorporated some of the provisions of the 1978 State Statute but none of the management rights provisions of the 1980 State Statute. *Local 589, ATU* v. *Commonwealth of Massachusetts*, 511 F.Supp. 312 (D.Mass. 1981) (App. 63a). On March 20, 1981, the District Court revised its order, thereby enjoining the layoffs of some Carmen employees based upon an agreement of the parties to proceed with interest arbitration according to the court-created procedures (App. 94a).

All parties appealed from one or both of the Federal District Court orders. The Carmen sought but, on April 9, 1981, were denied an injunction pending appeal in the U.S. Court of Appeals for the First Circuit. Nevertheless, the Court authorized the parties to proceed with any directly related matters during the pendency of the Appeal (App. 108a). The Machinists then filed a motion to compel grievance arbitration on the issue of the Authority's failure to pay cost of living wage adjustments pursuant to the collective bargaining agreement between it and the MBTA which had expired by its terms on December 31, 1977 but which the District Court held was continued in effect

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temporaneous court actions. *See, Cohen* v. *Massachusetts Bay Transportation Authority*, (D.C. Mass. Civ. No. 81-791), *aff'd*, F.2d (1st Circ. 1981).

by estoppel (App. 96a). The motion was opposed by the MBTA but the Machinists failed to mark it up for hearing.

The First Circuit heard oral arguments on June 6, 1981, and issued a comprehensive opinion on September 30, 1981 upholding the 1978 and 1980 State Statutes. (App. 110a) On October 23, 1981 the First Circuit, *per curiam* issued an additional opinion denying the Carmen's motions for reconsideration and rehearing *en banc*. On the same day, the District Court denied interlocutory relief with respect to the implementation of the 1980 State Statute.

Finally, on October 30, 1981, the District Court issued a ruling consistent with the First Circuit decision. (App. 105a) The court held that the 1978 and 1980 State Statutes established the ground rules under which the parties are to proceed in the immediate future. Mandate issued on November 3, 1981.

Having been unsuccessful in the First Circuit, during the months of October and November, 1981, both unions shifted their attention to the state courts. The Machinists withdrew their request in federal court for grievance arbitration over the MBTA's denial of cost of living adjustments. The Machinists commenced a separate action in the State Superior Court on identical grounds. *Lodge 264* v. *Massachusetts Bay Transportation Authority*, Superior Court No. 51214. Relief was denied and the action dismissed (App. 202a). An appeal has been filed in the state court.

Following the Machinists lead, the Carmen sought to revive the *Gallahue* case in an effort to prevent pending reductions in MBTA guards. The state Superior Court denied relief (App. 198a). The Carmen appealed to a single justice of the state Appeals Court, who summarily denied further relief. While the state court decisions on the guards were pending, the Carmen filed an entirely new action in the state court on the theory that their collective bargaining agreement is still in

effect and that the management rights section of the 1980 State Statute applies prospectively only to collective bargaining commenced after the effective date of the 1980 State Statute. *Local 589, ATU* v. *Massachusetts Bay Transportation Authority*, Superior Court No. 51582 (App. 203a). Despite the parallel and overlapping nature of the Carmen's action and the MBTA's timely and appropriate efforts to consolidate the state court cases, another hearing on the merits of the Carmen's claims is scheduled early in February of 1982.

Despite its length, the foregoing summary is a necessarily abbreviated account of the issues and multiple legal proceedings between the MBTA and its labor organization in 1981.[7] A more complete picture is provided by the many pages of docket sheets and court opinions appended hereto. Some cases addressing 13(c) issues between the parties have been omitted from this survey. Even relying only on those cases arising directly out of the 1978 and 1980 State Statutes as a common thread, the preceding chronology demonstrates the confusing guidelines and severe hardships under which the MBTA was forced to operate transportation service in 1981. An unfortunate and unavoidable result of the morass of litigation in state and federal courts between the parties is that, currently, fewer than twenty percent of eligible MBTA employees are parties to a valid existing collective bargaining agreement. If, as appears likely, no new collective bargaining agreements

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[7] Even as the MBTA writes this brief, the Carmen have filed yet another action in the Massachusetts Superior Court seeking to enjoin the MBTA from hiring part-time bus operators and to compel the MBTA to arbitrate wages, hours, and working conditions of part-time bus operators. *Local 589, ATU* v. *Massachusetts Bay Transportation Authority*, Superior Court No. 52672 (App. 310a). Therein the Carmen threaten a job action by a minority of their members which they claim would be contrary to the advice and admonitions of their duly elected officers. The matter of hiring part-time employees was first brought to the Superior Court in the *Gallahue* suit (App. 183a).

are executed between the MBTA and its employees within the next few months, the remaining agreements will expire and that percentage will be reduced to one percent.

II. Federal Court Subject Matter Jurisdiction of Contract Disputes Between Public Transit Authorities and Their Employees Will Not Further the Public Interest in the Conservation of Public Financial Resources and in Judicial Economy.

Of particular importance here are the adverse effects that will be experienced by public transit authorities nationwide (and by the taxpayers who support them) as a result of conflicting, overlapping, and duplicative decisions from state and federal courts in the event that both state and federal subject matter jurisdiction exists with respect to *any* contractual dispute between a federally funded public transit authority and its unionized employees. Federal court subject matter jurisdiction should not lie with respect to contractual questions relating exclusively to collective bargaining agreements. The state courts are the most appropriate or desirable forum for the interpretation of collective bargaining agreements between public transit authorities and their employees. The experiences of the MBTA in 1980 and 1981 in Massachusetts state and federal courts, as set forth hereinabove, graphically illustrate the consequences of granting to transit employees unfettered jurisdictional options. If the decision of the Sixth Circuit in this case is upheld in this Honorable Court, it is entirely possible that other transit authorities will be subjected to a multiplicity of lawsuits and forum shopping by plaintiff employees as has the MBTA.

The chronology of events giving rise to the Massachusetts cases is set forth in greater detail in Section I of this brief and

in decisions of Massachusetts state and federal courts which are appended hereto. Selected facts are advanced herein so as to emphasize and underscore the extent of legal and operational chaos precipitated by repetitive state and federal court actions and orders in the Massachusetts cases.

The Boston subway system (including the MBTA and its predecessors) comprises one of the oldest existing mass transit systems in the United States and probably one of the most controversial. Its complex and longstanding service and budgetary problems are directly traceable to its high labor costs and low levels of productivity. The notoriously restrictive labor practices perpetuated, in part, by its 13(c) agreements, are frequently acknowledged as contributing factors to the MBTA labor costs that are among the highest per mile in the United States. In response to the MBTA's cumulative and seemingly irreversible labor problems, the Massachusetts General Court adopted the 1978 and 1980 State Statutes. Both state statutes represented an emerging state policy designed to combat the continuing financial problems plaguing the MBTA.

It has been for some time a fact that the expenses of running the MBTA exceed its revenues from fares and other sources. This difference between revenues and expenditures is commonly called the MBTA "deficit." For calendar year 1981, the MBTA requested approval of a budget in the amount of $394,676,174. Of that amount $337,000,000 was approved, $57,676,174 less than the amount requested and $7,000,000 less than actual operating costs in 1980. As a result, and because it is not authorized to incur expenses in excess of its budget, the MBTA was forced to initiate substantial service cuts and layoffs of both management and union employees in 1981.

As set forth in the preceding section, the Carmen first sought relief in the Massachusetts Superior Court from the 1980 State Statute. Avoiding the constitutional and statutory issues pre-

sented, the state court addressed the issue of contractual interpretation so obviously at the core of the dispute. The state court ruled, inter alia, that layoffs must be accomplished according to the terms of the recently expired collective bargaining agreement. The entry of even limited injunctive relief in the state court immediately forced the MBTA to begin the year 1981 spending at an annual rate in excess of its approved budget.

Having had only marginal success in state court, the Carmen and the Machinists moved once again to the federal forum. The federal court enjoined substantially all proposed MBTA layoffs of Carmen and Machinists and ordered the Carmen to interest arbitration over the terms of a new contract according to court-created procedures that required a tripartite arbitration board which had been eliminated by the 1978 State Statute. The federal court subsequently extended the injunctions against layoffs of the Carmen on successive occasions pending an appeal by all parties to the First Circuit, which extensions effectively precluded the MBTA from living within its approved budget in 1981.

As a result of the 1981 court actions the MBTA, even with substantial service cuts, exceeded its 1981 budget as originally approved by its Advisory Board by some 12 million dollars.[8] Although the MBTA was ultimately successful on appeal to the First Circuit, adherence by the parties to the initial state court rulings would have cost the taxpayers substantially less (as much as $10,000,000) if layoffs could have been effected in 1981.

The potential costs to the taxpaying public nationwide if federal subject matter jurisdiction is found are amply demonstrated by the uncertainty, the direct out of pocket costs and

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[8] The Advisory Board approved a supplementary budget in the amount of approximately 12 million dollars in the summer of 1981.

the general chaos resulting from the bi-level court proceedings in Massachusetts. The pendency of multiple lawsuits alone has wrought havoc with day to day labor/management relations. The federal court-ordered arbitration (according to court-created procedures) cost the taxpayers more than $120,000 in direct out-of-pocket expenditures irrespective of lost MBTA staff time spent preparing for and participating in the arbitration proceedings. This incomplete and expensive arbitration has since been suspended in view of the decision of the First Circuit upholding the Massachusetts state statutes at issue. Moreover, MBTA preparation for each of four proposed layoffs that were subsequently enjoined required a significant investment of money and staff time and may be presumed to have resulted in other hidden costs.

In order to make up the difference between the projected total MBTA costs for 1981 and the 1981 approved budget, the MBTA had no alternative but to implement a substantial fare increase in August of 1981. Although the exact figures are in dispute, there seems to be general agreement that there has been a resulting loss in ridership with estimates ranging from 9.7% to 19.5% of the approximately 300,000 Massachusetts residents that ride the MBTA every day. The real cost to the public and the long-term environmental effects of the August, 1981 MBTA fare increase have yet to be identified and quantified.

It is no exaggeration to suggest to this Court that publicly operated mass transportation in the United States is in the midst of a labor crisis. The crisis lies in the continuing inflationary effects of runaway labor costs if 13(c) is not interpreted in light of the increased fiscal conservatism as manifested at both state and federal governmental levels. It is the position of the MBTA that federal court subject matter jurisdiction of contractual questions arising out of collective bargaining agreements will allow for the further escalation of transit labor costs because the federal judiciary is less likely to be familiar

with the complexities of local issues and sensitive to local ability to pay.

The MBTA submits that the Sixth Court of Appeals failed to assess fully the consequences to the public as a whole of its decision and to consider the overwhelming public interest in the speedy and economical resolution of labor issues arising under and over the terms of collective bargaining agreements between the states and public sector employees. Labor relations in the public sector have traditionally been a matter of state concern. *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Accordingly, it is reasonable, logical, and sound that state courts be determined to be the singular forum in which the merits of contractual questions arising principally out of collective bargaining agreements between public transportation authorities and their employees are decided.

Conclusion.

For the foregoing reasons, Massachusetts Bay Transportation Authority as *amicus curiae* in this action, supports the position of the Petitioners Jackson Transit Authority and the City of Jackson, Tennessee, and urges this Court to uphold the position that contract disputes between public transit authorities and their employees are not subject to federal jurisdiction, solely because of Section 13(c) unless there is an additional overriding federal question, as such assumption of jurisdiction tends to produce inconsistent findings and a lack of judicial economy. Labor's rights under Section 13(c) are more than

adequately protected by applicable grant contracts and by administrative powers vested in the Secretary of Transportation and the Secretary of Labor.[9]

Respectfully submitted,

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(617) 722-3156
Counsel for Massachusetts Bay Transportation Authority

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[9] *Local 589, ATU* v. *Commonwealth of Massachusetts*, No. 81-1180 (1st Cir. September 30, 1981) 12, 19-24, 35-36 (App. 122a, 128a-133a, 143a-144a).

Appendix

No. 81-411.

In the
Supreme Court of the United States.

OCTOBER TERM, 1981.

JACKSON TRANSIT AUTHORITY AND THE
CITY OF JACKSON, TENNESSEE,
PETITIONERS,
v.
LOCAL DIVISION 1285, AMALGAMATED TRANSIT
UNION, AFL-CIO-CLC,
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Appendix to Brief of Amicus Curiae in Support of Petitioners, Jackson Transit Authority and the City of Jackson, Tennessee, on Behalf of the Massachusetts Bay Transportation Authority.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Table of Contents.

Supreme Judicial Court
Docket entry, civil no. 79-388 1a

U.S. District Court for the District of Massachusetts
Docket entry 79-2058-N 3a
Docket entry 79-2059-N 11a

U.S. Court of Appeals for the First Circuit
Docket entry 81-1180 12a
Docket entry 81-1198 17a
Docket entry 81-1219 22a

Massachusetts Superior Court
Docket entries no. 45919 26a
Docket entries no. 51214 30a
Docket entries no. 51582 31a

Supreme Judicial Court, no. 79-388
Complaint 32a
Answer 38a
Complaint 41a

United States District Court no. 79-2059-S
Memorandum and order 55a

United District Court no. 79-2058-S
Memorandum & order 61a
Opinion 63a
Joint affidavit 92a
Order 94a
Plaintiff's motion to compel arbitration 96a
Order 104a
Memorandum and order after remand 105a
Notice of withdrawal of motion 107a

United States Court of Appeals 81-1198
Order 108a
Appeal 110a

United States Court of Appeals No. 81-1180, 81-1198 81-1219
Memorandum and Order 168a

Massachusetts Superior Court 45919
Complaint 172a
Amendment of complaint 177a

Further order on the request of the plaintiffs for a preliminary injunction 180a

Memorandum and order on the motion of the defendant to vacate or modify preliminary injunction 185a

Memorandum and order of the court upon the motion of the plaintiffs for reconsideration 190a

Interlocutory order on preliminary injunction 192a

Order on plaintiffs' motion for injunctive relief 193a

Massachusetts Appeals Court 81-0072-CV
Order 194a

Massachusetts Superior Court 45919
Memorandum of decision denying injunctive relief 197a

Massachusetts Superior Court 51214
Memorandum of opinion denying relief and dismissing complaint 201a

Massachusetts Superior Court 51582
Petition for declaratory relief 203a
Answer 206a

United States Court of Appeals 81-1211
Opinion 211a
Arbitration award 221a

Commonwealth of Massachusetts Acts and Resolves
c. 405 283a
c. 581 287a

Massachusetts Advance Sheets
MBTA Advisory Board v. MBTA 265a
MBTA Advisory Board v. The Governor 277a

Supreme Judicial Court

DOCKET ENTRY
CIVIL NO. 79-388

1979	
Sept. 10	Complaint filed.
Sept. 24	Summons returned with service endorsed thereon.
Oct. 10	Motion to enlarge time, filed.
Oct. 15	Answer filed.
Oct. 15	Petition for Removal filed.
1981	
Jan. 16	Docket sheet — Memo and Order of Remand from Federal District Court filed.
Feb. 4	Motion of the Commonwealth of Massachusetts to Intervene, filed.
Feb. 4	Motion to Substitute Defendants filed.
Feb. 11	Hearing held.
Feb. 13	Order [allowing Commonwealth's motions (1) to intervene in the action on the part of the plaintiff, and (2) to substitute defendants] as on file. (Kaplan, J.)
Feb. 13	Complaint of the Commonwealth of Massachusetts filed.
March 23	Motion to Fix Time for Filing Memorandum filed.
March 23	Motion to Dismiss filed.
March 27	Summons [of Richard J. Guiney] returned with service endorsed thereon.
March 27	Summons [of Bernard Corbett] returned with service endorsed thereon.
March 27	Summons [of Stanley Stearns] returned with service endorsed thereon.

1981

March 27	Summons (of John S. Weber) returned with service endorsed thereon.
March 27	Summons (on Redmand Condon) returned with service endorsed thereon.
March 27	Summons (on Anthony B. Romano) returned with service endorsed thereon.
March 27	Summons (of John J. O'Leary) returned with service endorsed thereon.
March 27	Summons (of Paul Connolly) returned with service endorsed thereon.
March 27	Summons (of John J. Gallahue) returned with service endorsed thereon.
March 27	Summons (of Local Division 589) returned with service endorsed thereon.
March 27	Summons (of Richard C. Branson) returned with service endorsed thereon.
April 10	Motion for Stay or Dismissal filed.
April 29	Commonwealth's Opposition to Defendant's Motion for Stay of Dismissal filed.
Feb. 11	Appearance of Joseph H. Elcock, Gen. C., Ronald G. Busconi, Asst. G.C. MBTA — 50 High St. Boston, 02110, 722-3156, for MBTA, filed.
Feb. 11	Appearance of Harold B. Roitman, Segal, Roitman & Coleman, 11 Beacon St., Boston, Ma 02108, 742-0208, for defendants filed.
Feb. 11	Appearance of Douglas Taylor, 1200 15th St., N.W., Washington, D.C. 20005, (202) 296-7420 for Defendants, filed.
Feb. 11	Appearance of Dwight Golann, One Ashburton Pl., Boston, Ma 02108, 727-4878, for Commonwealth of Massachusetts, Plaintiff-Intervenor, filed.

U.S. District Court for the District of Massachusetts
DOCKET ENTRY
79-2058-N

1979	
Oct. 15	Complaint filed. NELSON, J. Motion for alternate service ALLOWED BY THE COURT Summons issued.
Oct. 18	Motion of I. Gromfine and D. Taylor to appear, filed. c/s.
Nov. 3	NELSON, J. Motion to appear ALLOWED. cc/cl.
Nov. 7	Ds' motion to dismiss, filed. c/s.
Nov. 20	P's memo in opposition to motion to dismiss, filed.
1980	
Jan. 28	NELSON, J. DISQUALIFICATION, entered. cc/cl.
Jan. 28	FILE REASSIGNED TO JUDGE SKINNER. Counsel notified.
Nov. 20	Affidavit of Richard J. Guiney, filed.
Nov. 20	Mtn for S/J, filed.
Nov. 20	Memo in support of p's mtn for S/J, filed.
Nov. 20	Mtn to amend complaint, filed.
Dec. 3	MBTA d's opposition to p's mtn for S/J, filed. (c/s)
Dec. 3	SKINNER, D.J. Hearing on objections to USM's report, decision reserved.
Dec. 15	Mtn to amend complaint, filed.
Dec. 17	Answer, of the Comm. of Mass., filed. (c/s)
Dec. 23	Ints of deft, to pltf, filed. (c/s)
** 22	D's opposition to p's mtn for S/J, filed. (c/s)
Dec. 23	D's request for production of documents to pltf, (1st series), filed. (c/s)

1981

Jan. 16	Mtn for leave to file brief & affidavits in support of p's mtn for S/J, filed. (c/s)
Jan. 26	Mtn to permit verification of complaint allegations & attachments, filed. (c/s)
Jan. 26	Supplementary affidavit of Richard J. Guiney, filed. (c/s)
Jan. 26	P's reply brief in further support of its mtn for S/J, filed. (c/s)
Feb. 6	Affidavit of Raymond C. Wallace, filed.
Feb. 6	Affidavit of Thomas R. Roth, filed.
Feb. 6	Affidavit supplementary affidavit of Richard J. Guiney, filed.
Feb. 6	Mtn for P/I, filed.
Feb. 6	Memo in support of p's mtn for P/I, filed.
Feb. 6	Mtn to amend the complaint, filed.
Feb. 6	Affidavit of John J. Gallahue, Jr., filed.
Feb. 13	Mtn for leave to practice, for Linda R. Hirshman, filed. (c/s)
Feb. 13	Ans to ints propounded by deft, Comm of Mass., filed. (c/s)
Feb. 13	P's responses to requests for documents, by deft, Comm of Mass., filed. (c/s)
Feb. 17	Comm of Mass opposition to p's mtn to amend the complaint, filed. (c/s)
Feb. 17	Deft, Comm of Mass opposition to p's mtn for P/I, filed. (c/s)
Feb. 18	Mtn to intervene as pltf, filed. (c/s)
Feb. 27	P's mtn for P/I, filed. (c/s)
Mar. 4	Comm.'s mtn to compel ans to ints, filed. (c/s)
Mar. 5	Mtn for adtn'l preliminary relief & a T.R.O., FILED.
Mar. 5	Memo in support of T.R.O., filed.

1981

Mar. 5	Supplementary affidavit of John J. Gallahue, Jr., filed.
Mar. 5	Reply memo in further support of p's mtn for P/I & to amend the complaint & opposition to the mtn of deft, Comm. of Mass for leave to submit a 2nd memo of law "At such time as the court schedules a hearing on this matter", filed. (c/s)
Mar. 6	Mtn for leave to file reply brief, filed. (c/s)
Mar. 6	Opposition to mtn of deft, Comm of Mass. for leave to submit a 2nd memo of law "At such time as the court schedules a hearing on this matter"., filed. (c/s)
Mar. 6	SKINNER, D.J. — Case called for hearing on p's mtn for T.R.O.; arguments by counsel; decision reserved; hearing on P/I request scheduled for 3/11/12/81 at 9AM; d's to file documents & opposing brief by 3/11/81. Mtn of Linda Hirshman, Esq. for leave to appear prohac vice filed & ALLOWED.
Mar. 6	Mtn for a TRO., filed. (c/s)
Mar. 6	Mtn to amend the complaint, filed. (c/s)
Mar. 9	SKINNER, D.J. — MEMO & ORDER re: TRO DENIED. (cc/cl)
Mar. 9	Notice of appearance for pltf, Lodge 264, by William J. Riley, filed.
Mar. 11	Affidavit of Anthony Mastandrea, filed. (c/s)
Mar. 11	P's memo of law in further support of its mtn for a P/I, filed. (c/s)
*** 10	Steno transcript of hearing on a TRO, from 3/6/81, filed.
Mar. 13	P's mtn for a P/I, filed. (c/s)
Mar. 13	Pltf, Lodge 264's supplemental memo of law in further support of its mtn for a P/I, filed. (c/s)

1981

Mar. 13 P's brief in further support of its mtn for a P/I, filed. (c/s)

Mar. 17 Letter to D.J. SKINNER, from Linda Hirshman dated 3/16/81, filed.

Mar. 17 SKINNER, D.J. — PRELIMINARY INJUNCTIONS, ENTERED 3/17/81. (cc/cl)

Mar. 17 SKINNER, D.J. — MEMO & ORDER re:mtns for P/I, ENTERED 3/17/81. (cc/cl)

*** 11 SKINNER, D.J. — Case called for hearing on p's mtn for P/I; Commonwealths' memo of law in opposition to p's mtn, for adtn'sl relief filed; Commonwealths' appendix to memo of law filed; arguments by counsel; cont. to 3/12/81 at 9AM.

Mar. 12 SKINNER, D.J. — Hearing on p's mtn for P/I continues; decision reserved.

Mar. 19 Mtn for stay or injunction pending appeal, filed. (c/s)

Mar. 19 Notice of appeal filed by the pltf. (cc/cl)

Mar. 19 SKINNER, J. Hearing on pltf's motion for stay or injunction pending appeal; arguments by counsel; motion denied. . . .counsel shall file a joint affidavit by 3/20/81 at 12Noon.

Mar. 20 SKINNER, J. Conference with counsel; joint affidavit filed; Court enters the following order: 1) The pltf's motion for stay or injunction pending appeal is hereby denied except that the MBTA shall not lay off employees represented by the pltf Division 589, A.T.U. in the following categories until sixty days from date of this order, which date may be extended by further order of Court upon application by one of the parties: (a) non-miscellaneous employees hired before August 8, 1979 (b) all other permanent employees in any

1981

other classification regardless when hired (c) the parties shall proceed to interest arbitration as set forth in the Court's Order of 3/17/81; one begun, arbitration shall proceed from day to day unless an alternative schedule is approved by this Court. (Copies of order given to counsel by clerk)

Mar. 20 Certified cpy of docket entries and Preliminary Injunctions; Motion for Stay or Injunction pending Appeal; Notice of Appeal; Joint Affidavit; Order forwarded to the Court of Appeals.

Mar. 25 Mtn for stay pending appeal, from Comm. of Mass., filed. (c/s)

Mar. 25 SKINNER, D.J. — re: #53, "I have heard arguments on their mtn on 3/19/81. I perceive no likelihood of irreparable harm justifying a stay of the order. Mtn DENIED. (cc/cl)

Mar. 25 Notice of Appeal filed by the defts (c/s) (F.F. pd. 4/18/81)

Mar. 30 Comm.'s answer to amended complaint, filed. (c/s)

Mar. 31 Comm.'s ans to intervenor Lodge 264's complaint, filed. (c/s)

April 1 Notice of Appeal and certified copy of the docket sheet forwarded to the court of appeals

April 3 Original pleadings forwarded to the Court of Appeals Informally.

April 6 Original pleadings forwarded to the Court Of Appeals under Supplemental Certificate.

April 6 Mass. Bay Trans. Auth. Notice of Appeal filed. c/s (F.F. pd.)

April 6 Notice of Appeal, Docket entries certified to the Court of Appeals.

1981

April 9	Order of Court received from the Court of Appeals entered ..... The motion for injunction pending appeal is denied .....
April 16	Folder of exhibits sent to the court of appeals on a supp. cert.
April 16	P's mtn to compel arbitration, filed. (c/s)
April 16	Affidavit of Anthony Mastandrea, filed. (c/s)
April 22	Answer of deft's MBTA & Robert L. Foster to amended complaint, filed. (c/s)
April 27	Letter to D. Clerk, Nuzzolo dated 4/27/81, from William J. Riley, filed.
April 28	Comm.'s opposition to Boston Lodge 264's mtn to compel arbitration, filed. (c/s)
April 30	Opposition of deft MBTA to intervening p's mtn to compel arbitration, filed. (c/s)
May 5	Letter to Clerk C. Nuzzolo dated 5/4/81, from Dwight Golann, filed.
May 5	Comm.'s mtn for clarification, filed. (c/s)
May 5	Memo of law in opposition to mtn for P/I & in support of mtn for clarification, filed. (c/s)
May 7	Mtn to ext P/I & order, filed. (c/s)
May 7	M.B.T.A. & Barry Locke's ans to complaint by intervening pltf, Lodge 264, filed.
May 8	Steno Transcript of hearing on TRO from 3/11/81, filed.
May 8	Steno Transcript of hearing on TRO from 3/12/81, filed.
May 12	Mtn to reconsider, filed. (c/s)
May 12	Further affidavit of Thomas R. Roth, filed. (c/s)
May 12	Memo of law in opposition to deft, mtn for clarification & in support of p's mtn reconsider, filed. (c/s)

1981

May 13	Steno Transcript of hearing from 3/19/81, filed. (c/s)
May 15	SKINNER, D.J. — ORDER re: mtns for clarification & reconsideration of memo of 3/1 (cc/cl)
May 18	Motion to extend pre/inj and order, Motion to reconsider, Further affidavit of T. R. Roth, Memo of law in opposition to motion for pre/inj and in support of motion for clarification, affidavits, and Order on motions for clarification and reconsideration of memo of March 17, 1981, sent to the court of appeals on supp. cert.
May 18	Steno transcript of hearing from 5/13/81, filed.
May 19	Transcript for 5/13/81 sent to the court of appeals on a supp. cert.
May 21	Mtn to amend clarification order, filed. (c/s)
May 21	Further affidavit of John J. Gallahue, Jr., filed. (c/s)
May 22	Steno transcript for March 19, 1981 sent to the court of appeals on a supp. cert.
June 3	Mtn for leave to file signed affidavits, filed. (c/s)
July 23	Mtn to ext P/I, to 9/20/81, filed. (c/s)
July 30	SKINNER D.J. — re: order of 3/20/81, be ext to 9/20/81, ORDER, ENTERED 7/28/81.
July 31	Motion to extend pre/order and order sent to the court of appeals on a supp. cert.
Sept. 30	Opinion received from the Court of Appeals entered. . . .Accordingly to the extent that it is inconsistent with this opinion, the district court's order of March 17, 1981, as clarified on May 15, 1981, is vacated and the case is remanded for further proceedings consistent with this opinion.
Oct. 23	SKINNER, J. Hearing on pltf's motion for tro and preliminary injunction; motion denied without prejudice: Court will issue new order by end of week.

1981	
Oct. 26	Notice of withdrawal of motion, filed c/s
Oct. 29	*SKINNER, D.J.* re: 79 Motion Allowed, by the court, cc/cl
Oct. 30	*SKINNER, D.J.* Memo and order after remand, entered cc/cl
Nov. 4	Mandate received from the Court of Appeals entered 9/30/81. . . . is vacated and the case is remanded for further proceedings consistent with the opinion filed this day. Original pleadings returned from the Court Of Appeals.

U.S. District Court for the District of Massachusetts
DOCKET ENTRY
79-2059-N

1979	
Oct. 15	Petition for removal, filed. Memo in support of petition, filed. Verification of petition, filed. Motion for leave to appear of D. Taylor and I. Gromfine, filed. Removal bond in the amount of $250.00 from Fidelity and Deposit Co. of Maryland, filed.
Oct. 22	Certified copies of state court pleadings, filed.
Oct. 26	Opposition of respondent to petition for removal, filed. c/s. Memo in support of opposition, filed. c/s
Nov. 6	NELSON, J. Motions to admit attorneys ALLOWED BY THE COURT. cc/cl. Case referred to Magistrate _____ on petition for removal (Alexander)
1980	
Jan. 28	NELSON, J. DISQUALIFICATION, entered. cc/cl.
Jan. 28	FILE REASSIGNED TO JUDGE SKINNER. Counsel notified.
Oct. 22	*ALEXANDER, USM.* — Findings & Recommendation, Entered 10/22/80, re: petition for removal.
Nov. 5	Objections of respondent MBTA to USM's findings & recommendation on petition for removal & respondent's mtn for rehearing, filed. (c/s)
Dec. 1	Mtn for consolidation, filed.
Dec. 1	Mtn for leave to file brief in support of mtn to consolidate, filed. (c/s)
Dec. 1	Brief in support of mtn to consolidate, filed. (c/s)
Dec. 3	SKINNER, D.J. — Hearing on objections to USM's report, decision reserved.
Dec. 24	SKINNER, D.J. — MEMO & ORDER, ENTERED ON 12/24/80 (cc/cl)

United States Court of Appeals
for the First Circuit
DOCKET ENTRY
81-1180

1981

Mar. 20 Copy of notice of appeal and docket entries received and filed. Case docketed. Notices mailed. [jc]

Mar. 23 Record on appeal in one volume received and filed. Notices mailed. (cb)

Mar. 25 Appearance of Linda R. Hirshman, Esquire, Jacobs, Burns, Sugarman & Orlove, for plaintiff-appellant received and filed. (cb) Appearance of Dwight Golann, Esq., for appellee, Commonwealth of Massachusetts, received and filed. (cb)

Mar. 30 Appearances of Joseph H. Elcock and Ronald G. Busconi, Esquires, for appellees MBTA and Robert L. Foster received and filed. Docketing statement received and filed. (cb)

Mar. 31 Motion for oral argument, motion to expedite appeal and motion for injunction pending appeal and memorandum in support thereof received and filed. (cb)

April 1 Order (Campbell & Breyer, JJ.) Upon consideration of motions of appellant in Case No. 81-1180; it is ordered as follows: Cas No. 81-1180 is assigned for hearing on the motion for injunction pending appeal and the motion to expedite appeal; Case No. 81-1198 is assigned for hearing on the question of whether this appeal should be expedited if the appeal in No. 81-1180 is expedited; These hearings are assigned for argument on Wednesday, April 8, 1981 at 2:15 P.M. Plaintiffs are allotted 20 minutes and the defendants are

1981

April 1 allotted a total of 20 minutes for argument. Defendants are directed to file a memorandum of law with proof of service in hand, by noon on Tuesday, April 7, 1981. Notice mailed. [eam]

April 6 Record on appeal in two volumes, filed, supplemental certificate consisting of certain documents, filed. (mn)

April 7 Commonwealth's memorandum in opposition to Plaintiff-Appellant's motions for injunction and for expedited appeal received and filed. (cb) Massachusetts Bay Transportation Authority Defendants' opposition to plaintiff-appellant's motion for injunction pending appeal filed. [1]

April 7 Appearances of Michael A. Feinberg, Esq., and William J. Riley, Esquire, for appellant received and filed. (cb)

April 8 Heard by Campbell, Bownes & Breyer, J.J. [1am]

April 9 Additional authorities in reply to Commonwealth's Memorandum in opposition to plaintiff/appellant's motions for injunction & for expedited appeal, filed. (mn)

April 9 Order (Campbell, Bownes and Breyer, J.J.) denying motion for injunction pending appeal; consolidating this case and 81-1198 for the purpose of briefing and argument and the cases are assigned for hearing at the June, 1981 session, authorizing and encouraging parties to seek speedy resolution of all directly related matters whether in the state or district courts, and the district court is authorized in its discretion to decide any such matters notwithstanding the pendancy of these appeals; briefs for all parties are to be filed on or before May 22, 1981 and the parties are excused from filing an appendix. Notices mailed. (jmv)

1981

April 17 Supplemental certificate consisting of one folder of exhibits, received and filed. (mn)

May 20 Supplemental certificate consisting of transcript and supplemental pleading received and filed. (cb)

May 20 Motion for Division 589, amalgamated Transit Union to file brief in excess of 50 pages received and filed. (ar) Order (Bownes, J.) Leave is granted plaintiff, Division 589, Amalgamated Transit Union to file a principal brief not in excess of 60 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. It is also ordered that the time for said plaintiff to file its brief be enlarged to May 26, 1981. Notices mailed. [eam]

May 21 Motions filed. Order (Bownes, J.) Upon motion of the Commonwealth of Massachusetts to file a brief of sixty pages and upon motion of Massachusetts Bay Transportation Authority to enlarge the time for filing its brief, It is ordered that leave be granted the Commonwealth of Massachusetts to file a principal brief not in excess of 60 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. It is further ordered that the time for Massachusetts Bay Transportation Authority to file their brief be enlarged to May 26, 1981. Notices mailed. [eam]

May 21 Motion for Leave to File a Brief in Excess of 60 Pages filed. (1aa).

May 21 Order (Bownes, J.) granting leave to Local Division 589 etc. to file a brief consisting of not more than 100 pages; granting leave to appellee Com-

1981

monwealth of Massachusetts to file a brief consisting of not more than 75 pages. Notices mailed. (jmv)

May 22 Supplemental Certificate to Record on Appeal consisting of one volume of transcript received and filed. (1aa). Assigned for hearing at the June, 1981 session. [eam]

May 26 Brief for Local Division 589, received and filed. [eam]

May 27 Brief for the appellee/Commonwealth of Massachusetts and appendix, received and filed. (mn) Brief for M.B.T.A. received and filed. [eam]

May 29 Motions filed. Order (Bownes, J.) Upon consideration of motion of Local 589, It is ordered that the times for oral argument are reallotted as follows: 45 minutes for Local 589, etc., and 45 minutes total to be shared between the Commonwealth of Massachusetts and Massachusetts Bay Transportation Authority. Upon consideration of motion of Commonwealth of Massachusetts, Leave is granted the Commonwealth to file a reply brief today. Notices mailed. Reply brief for Commonwealth received and filed. [eam]

May 29 Motion to rectify oral argument schedule received and filed. (ar)

June 1 Motion filed. Order (Bownes, J.) Leave is granted plaintiff, Local Division 589, Amalgamated Transit Union to file a reply brief instanter. Notices mailed. Reply brief for Local Division 589, received and filed. [eam]

June 2 Commonwealth's Opposition to Union's Motion to File Reply Brief, received and filed. Order (Campbell, J.) T- ating the Commonwealth's

1981

opposition to Union's motion to file reply brief as a motion for reconsideration of this Court's order entered on June 1, 1981, It is ordered that said motion is denied. Notices mailed. (cb) Heard by Campbell, Bownes & Breyer, J.J. [1am]

July 31 Supplemental Certificate to Record on Appeal consisting of Motion to extend pre/order filed. (1aa)

Aug. 21 Supplemental certificate to record on appeal consisting of certain documents received and filed. (jmv)

Sept. 30 JUDGMENT: Accordingly, to the extent that it is inconsistent with this opinion, the district court's order of March 17, 1981, as clarified on May 15, 1981, is vacated and the case is remanded for further proceedings consistent with the opinion filed this Day. No costs. Opinion of the court by Breyer, J. Notices mailed. (jmv)

Oct. 13 Petition for reconsideration and application for rehearing en banc and for thirty days to file a brief in support thereof received and filed. (cb)

Oct. 22 Commonwealth's opposition to motion for extension of time received and filed. (1b)

Oct. 23 Memo & Order (Coffin, Campbell, Bownes and Breyer, J.J.) denying motions for a rehearing, rehearing en banc, and extension of time to file a further brief. Notices mailed. Memo & Order of the court per curiam. (jmv)

United States Court of Appeals
for the First Circuit
DOCKET ENTRY
81-1198

1981	
Mar. 27	Copy of notice of appeal and of district court docket entries received and filed and case docketed. Notices mailed. (mn) Record on appeal previously filed in Case No. 81-1180, received and filed. Notices mailed. (mn)
April 1	Order (Campbell & Breyer, JJ.) Upon consideration of motions of appellant in case No. 81-1180; it is ordered as follows: Case No. 81-1180 is assigned for hearing on the motion for injunction pending appeal and the motion to expedite appeal; Case No. 81-1198 is assigned for hearing on the question of whether this appeal should be expedited if the appeal in No. 81-1180 is expedited; These hearings are assigned for argument on Wednesday, April 8, 1981 at 2:15 P.M. Plaintiffs are allotted 20 minutes and the defendants are alloted a total of 20 minutes for argument. Defendants are directed to file a memorandum of law with proof of service in hand, by noon on Tuesday, April 7, 1981. Notices mailed. [eam] Record on appeal received and filed. [eam]
April 6	Record on appeal in two volumes, filed, supplemental certificate Docketing statement received and filed. (cb)
April 7	Memorandum of Law by Boston Lodge 264, District 38, International Association of Machinists, etc., received & filed. (mn)

1981

April 8 Appearances of Joseph H. Elcock and Ronald G. Busconi, Esquire for appellee and Linda R. Hirshman, Esquire, for appellant received and filed. (cb) Heard by Campbell, Bownes & Breyer, J.J. [1am]

April 9 Order (Campbell, Bownes and Breyer, J.J.) denying motion for injunction pending appeal; consolidating this case and 81-1180 for the purpose of briefing and argument and the cases are assigned for hearing at the June, 1981 session; authorizing and encouraging parties to seek speedy resolution of all directly related matters whether in the state or district courts, and the district court is authorized in its discretion to decide any such matters notwithstanding the pendancy of these appeals; briefs for all parties are to be filed on or before May 22, 1981 and the parties are excused from filing an appendix. Notices mailed. (jmv)

April 17 Supplemental certificate consisting of one folder of exhibits, received and filed. (mn)

May 20 Supplemental certificates consisting of transcript for May 13 and supplemental pleadings received and filed. (cb)

May 20 Motion for Division 589, amalgamated Transit Union to file brief in excess of 50 pages received and filed. (ar) Order (Bownes, J.) Leave is granted plaintiff, Division 589, Amalgamated Transit Union to file a principal brief not in excess of 60 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. It is also ordered that the time for said plaintiff to file its brief be enlarged to May 26, 1981. Notice mailed. [eam]

1981

May 21 Motion filed. Order (Bownes, J.) Upon motion of the Commonwealth of Massachusetts to file a brief of 60 pages and upon motion of Massachusetts Bay Transportation Authority to enlarge the time for filing its brief, It is ordered that leave be granted the Commonwealth of Massachusetts to file a principal brief not in excess of 60 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. It is further ordered that the time for Massachusetts Bay Transportation Authority to file their brief be enlarged to May 26, 1981. Notices mailed. [eam]

May 21 Motion for Leave To File a Brief in Excess of 60 Pages filed. (laa).

May 21 Order (Bownes, J.) granting leave to Local Division 589, etc. to file a brief consisting of not more than 100 pages; granting leave to appellee Commonwealth of Massachusetts to file a brief consisting of not more than seventy five pages. Notices mailed. (jmv)

May 22 Supplemental Certificate to Record on Appeal consisting of one volume of transcript received and filed. (laa). Assigned for hearing at the June, 1981 session. [eam]

May 26 Brief for Local Division 589, received and filed. [eam]

May 27 Brief for the appellee/Commonwealth of Massachusetts and appendix, received and filed. (mn) Brief for M.B.T.A., received and filed [eam]

May 29 Motions filed. Order (Bownes, J.) Upon consideration of motion of Local 589, It is ordered that the times for oral argument are reallotted as

1981	follows: 45 minutes for Local 589, etc. and 45 minutes total to be shared between the Commonwealth of Massachusetts and Massachusetts Bay Transportation Authority. Upon consideration of motion of Commonwealth of Massachusetts, Leave is granted the Commonwealth to file a reply brief today. Notices mailed. Reply brief for the Commonwealth received and filed. [eam]
May 29	Motion to rectify oral argument schedule received and filed. (ar)
June 1	Motion filed. Order (Bownes, J.) Leave is granted plaintiff, Local Division 589, Amalgamated Transit Union to file a reply brief instanter. Notices mailed. Reply brief for Local Division 589, received and filed. [eam]
June 2	Commonwealth's Opposition to Union's motion to file reply brief, received and filed. Order (Campbell, J.) Treating the Commonwealth's opposition to Union's motion to file reply brief as a motion for reconsideration of this Court's order entered on June 1, 1981, It is ordered that said motion is denied. Notices mailed. (cb) Heard by Campbell, Bownes & Breyer, J.J. [1am]
July 31	Supplemental Certificate to Record on Appeal consisting of Motion to extend pre/order filed. (1aa).
Aug. 21	Supplemental certificate to record on appeal consisting of certain documents received and filed. (jmv)
Sept. 30	JUDGMENT: Accordingly, to the extent that it is inconsistent with this opinion the district court's order of March 17, 1981, as clarified on May 15,

1981

1981, is vacated and the case is remanded for further proceedings consistent with the opinion filed this day. No costs. Opinion of the court by Breyer, J. Notices mailed. (jmv)

Oct. 13 Petition for reconsideration and application for rehearing en banc and for thirty days to file a brief in support thereof received and filed. (cb)

Oct. 22 Commonwealth's opposition to motion for extension of time received and filed. (1b)

Oct. 23 Memo & Order (Coffin, Campbell, Bownes & Breyer, J.J.) denying motions for a rehearing, rehearing en banc and for extension of time to file further brief. Notices mailed. Memo & Order of the court per curiam. (jmv)

United States Court of Appeals
for the First Circuit
DOCKET ENTRY
81-1219

1981	
April 7	Notice of appeal and docket entries received and filed. Record on appeal in 81-1180, 81-1198 & 81-1211. Case docketed. Notices mailed. [jc]
April 8	Appearance of Joseph H. Elcock, Ronald G. Busconi, for MBTA, filed. (mn)
April 14	Appearance of Paul F. Kelly, for appellee/Local Div. 589, filed. (mn)
April 17	Supplemental certificate consisting of one folder of exhibits, received and filed. (mn)
April 21	Appearance of Linda Hirshman, for appellee, filed. (mn)
May 19	Motion filed. Order (Bownes, J.) granting leave to appellant to consolidate this appeal with 81-1180 and 81-1198. Notices mailed. [jc] Docketing statement received and filed. (cb)
May 20	Supplemental certificates consisting of transcript of May 13 and supplemental pleadings received and filed. (cb)
May 20	Motion for Division 589, Amalgamated Transit Union to file brief in excess of 50 pages and for extension, received and filed. [eam] Order (Bownes, J.) Leave is granted plaintiff, Division 589, Amalgamated Transit Union to file a principal brief not in excess of 60 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. It is also ordered that the time for said plaintiff to file its brief be enlarged to May 26, 1981. Notices mailed. [eam]

1981

May 21 Motions filed. Order (Bownes, J.) Upon motion of the Commonwealth of Massachusetts to file a brief of 60 pages and upon motion of Massachusetts Bay Transportation Authority to enlarge the time for filing its brief, It is ordered that leave be granted the Commonwealth of Massachusetts to file a principal brief not in excess of 60 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. It is further ordered that the time for Massachusetts Bay Transportation Authority to file their brief be enlarged to May 36, 1981. Notices mailed. [eam]

May 21 Order (Bownes, J.) granting leave to Local Division 589, etc., to file a brief consisting of not more than 100 pages; granting leave to appellee Commonwealth of Massachusetts to file a brief consisting of not more than 75 pages. Notices mailed. (jmv)

May 22 Supplemental Certificate to Record on Appeal consisting of one volume of transcript received and filed. (1aa). Assigned for hearing at the June, 1981 session. [eam]

May 26 Brief for Local Division 589, received and filed. [eam]

May 27 Brief for the appellee/Commonwealth of Massachusetts and appendix, received and filed. (mn)

May 27 Brief for M.B.T.A., received and filed. [eam]

May 29 Motions filed. Order (Bownes, J.) Upon consideration of motion of Local 589, It is ordered that the times for oral argument are reallotted as follows: 45 minutes for Local 589, etc. and 45 minutes total to be shared between The Commonwealth

1981

of Massachusetts and Massachusetts Bay Transportation Authority. Upon consideration of motion of The Commonwealth of Massachusetts, Leave is granted the Commonwealth to file a reply brief today. Notices mailed. Reply brief for the Commonwealth received and filed. [eam]

May 29 Motion to rectify oral argument schedule received and filed. (ar)

June 1 Motion filed. Order (Bownes, J.) Leave is granted plaintiff, Local Division 589, Amalgamated Transit Union to file a reply brief instanter. Notices mailed. Reply brief for Local Division 589 received and filed. [eam]

June 1 Motion filed. Order (Campbell, J.) leave is granted appellee, Boston Lodge 264, District 38, International Association of Machinists and Aerospace Workers to file their brief instanter. Notices mailed. (mn) Brief for appellee/Boston Lodge 264, etc., received and filed. (mn)

June 2 Commonwealth's Opposition to Union's motion to file reply brief, received and filed. Order (Campbell, J.) Treating the Commonwealth's opposition to Union's motion to file reply brief as a motion for reconsideration of this Court's order entered on June 1, 1981, It is ordered that said motion is denied. Notices mailed. (cb) Heard by Campbell, Bownes & Breyer, J.J. [1am]

July 31 Supplemental Certificate to Record on Appeal consisting of Motion to extend pre/order filed. (1aa).

Aug. 21 Supplemental certificate to record on appeal consisting of certain documents received and filed.

1981

Sept. 30 JUDGMENT: Accordingly, to the extent that it is inconsistent with this opinion, the district court's order of March 17, 1981, as clarified on May 15, 1981, is vacated and the case is remanded for further proceedings consistent with the opinion filed this day. No costs. Opinion of the court by Breyer, J. Notices mailed. (jmv)

Oct. 13 Petition for reconsideration and application for rehearing en banc and for thirty days to file a brief in support thereof received and filed. (cb)

Oct. 22 Commonwealth's opposition to motion for extension of time received and filed. (lb)

Oct. 23 Memo & Order (Coffin, Campbell, Bownes and Breyer, J.J.) denying motions for a rehearing, rehearing en banc and for extension of time to file a further brief. Notices mailed. Memo & Order of the court per curiam. (jmv)

Massachusetts Superior Court
DOCKET ENTRY
No. 45919

1980	
Dec. 24	Complaint. Notice ordered issued re: prayers 2 and 3 returnable Tuesday, December 30, 1980. (Lynch, C.J.). Summons and order of notice issued.
Dec. 24	Civil action cover sheet re: complaint.
Dec. 31	Order on the Request for Preliminary Injunction.
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Jan. 2	Plff's. response to Order on the request for Preliminary Injunction.
Dec. 30	Summons and Order of Notice returned.
Dec. 30	Affidavit of Thomas C. Cameron.
Jan. 7	Further Order on the Request of the Plaintiffs for a Preliminary Injunction — Young, J. Copies in hand.
Jan. 9	Upon payment to the Clerk/Magistrate of sum of $25.00 and the filing of appropriate bonds a Preliminary Injunction is ordered to issue under the further Order on Request of the plffs. for Preliminary Injunction prayers of the Complaint to Continue in force until further Order of Court. (Young, J.). (See P#1).
Jan. 9	Amended Complaint.
Jan. 9	Preliminary Injunction Bond of plff. Local Division 589, Amalgamated Transit Union, AFL-CIO, CLC in the sum of $50,000.00 filed & Approved, (Adams, J.).
Jan. 9	Preliminary Injunction Bond of plff. Boston Lodge 264 of District No. 38 International Association of Machinists & Aerospace Workers, AFL-CIO in the sum of $25,000.00 filed & Approved, (Adams, J.).

1981

Jan. 9	Preliminary Injunction Bond of plff. Building & Construction Trades' Council of the Metropolitan District in the sum of $25,000.00 filed & Approved, (Adams, J.).
Jan. 9	Fee Paid. Interlocutory Order on Preliminary Injunction until further order of Court. (Young, J.).
Jan. 12	Preliminary Injunction Bond of Boston Lodge No. 384, Allied Services Division, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees in the sum of $25,000.00 filed & Approved, (Adams, J.).
Jan. 12	Preliminary Injunction Bond of plff. Local Union #717 of the International Brotherhood of Electrical Workers, AFL-CIO in the sum of $25,000.00 filed & Approved, (Adams, J.).
Jan. 12	Preliminary Injunction Bond of plff. International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 104 in the sum of $25,000.00 filed & Approved, (Adams, J.).
Jan. 12	Interlocutory Order on Preliminary Injunction until further order of Court. (Young, J.).
Jan. 13	Preliminary Injunction Bond of plff. Local 6 Office and Professional Employees International Union, AFL-CIO (Clerical Unit) in the sum of $25,000.00 filed & Approved, (Adams, J.).
Jan. 13	Preliminary Injunction Bond of plff. Massachusetts Bay Transportation Authority Police Association in the sum of $25,000.00 filed & Approved, (Adams, J.).
Jan. 13	Interlocutory Order on Preliminary Injunction until further order of Court. (Young, J.).
Jan. 16	ANSWER.

1981

Feb. 2	Memorandum and Order on the Motion of the Deft. to Vacate or Modify Preliminary Injunction. Young, J. Notice in hand.
Feb. 12	Mo. of Electrical Workers Local 104 for return of Bond. Filed & allowed. (Young, J.)
Feb. 12	ORDER releasing original bond to attorneys for International Brotherhood of Electrical Workers AFL-CIO Local Union #104. (Adams, J.)
Feb. 13	Motion of plffs. for rehearing re: Preliminary Injunction.
Feb. 24	Memorandum and Order of the Court upon the Motion of the Plaintiffs for Reconsideration, Young, J. Copies in hand.
March 19	Motion of plffs. for Injunctive Relief.
March 19	Aff. of John J. Gallahue, Jr.
March 19	Aff. of John Weber.
March 19	Aff. of Richard L. Whelan.
March 19	Aff. of Richard J. Guiney.
March 20	Aff. of Paul J. Murphy.
March 20	Motion (P#24) After hearing examination of the affidavits submitted & considering the memoranda filed by counsel, & also examining prior memoranda of this court (Young, J.) filed on 1/7/81, 2/2/81 & 2/24/81 & concluding there has been a showing as to the likelihood of success on the merits a change in circumstances in the proposed action of the Authority scheduled for Mar. 21, 1981 a showing of present physical risk to the plffs. and a strong public interest to be protected (injury to the public) the Motion is Allowed. (Ronan, J.).
March 20	ORDER on plffs. motion for injunctive relief. Allowed. (Ronan, J.). Notice sent. 3/26/81.

1981

March 20	Motion of deft. to strike affidavit of Richard L. Whelan & for other appropriate relief. Denied. (Ronan, J.).
March 20	Affidavit of Paul J. Murphy.
March 20	Fee Pd. Interlocutory Order on Preliminary Injunction. (Ronan, J.).
June 26	Mo. of plffs. for extension of injunctive relief.
July 1	Mo. (P#34). After hearing, motion Denied (Young, J.). Notice sent 7/2/81.
Nov. 5	Motion of deft. to vacate Order on Preliminary Injunction.
Nov. 6	Motion of plff. for Injunctive Relief. Filed by leave. (Meyer, J.).
Nov. 6	Application for preliminary injunction denied. Memo to follow. (Meyer, J.). (See P#36).
Nov. 13	Memorandum of decision denying Injunctive Relief. (Meyer, J.). Notice sent 11/16/81.
Dec. 31	Motion of plff. Amalgamated Transit Union, Local 589, to release Preliminary Injunction Bond, in the sum of $50,000.00.

Massachusetts Superior Court
DOCKET ENTRY
No. 51214

1981	
Oct. 22	Complaint. Notice ordered issued re: p# 1-2 ret'ble Mon., Nov. 9, 1981. (Steadman, J.) Summons and order of notice issued.
Oct. 22	Civil Action Cover Sheet given in hand to filing party when complaint filed.
Oct. 26	Civil Action Cover Sheet returned re: Complaint.
Nov. 2	Summons & Order of Notice returned.
Nov. 9	ANSWER.
Nov. 10	MEMORANDUM of Opinion Denying Relief & Dismissing Complaint. (Meyer, J.). notice sent.
Nov. 16	Plff's Notice of Appeal.
Nov. 19	Affidavit of Anthony Mastandrea in support of plff's verified complaint & app. for Order to proceed to Arbitration.
Nov. 20	JUDGMENT ON FINDINGS BY THE COURT FOR DEFENDANT: Complaint of plaintiff is dismissed, with prejudice and without costs., entered on Docket pursuant to Mass. R. Civ. P. 58(a) and notice sent to parties pursuant to Mass. R. Civ. P. 77(d).
Dec. 3	Plff's Notice of Appeal.
Dec. 9	Notice to Justice Andrew Gill Meyer of the filing of a Notice of Appeal.
Dec. 9	Notice of Service of Notice of Appeal as to Ronald G. Busconi, Asst. General Counsel.
1982	
Jan. 4	Plff's. statement under Rule 8(c).

Massachusetts Superior Court
DOCKET ENTRY
No. 51582

1981	
Nov. 10	Complaint. Notice ordered issued re: prayer 2 returnable Thursday, November 12, 1981. (Meyer, J.) Summons and order of notice issued.
Nov. 10	Civil action cover sheet re: complaint.
Nov. 12	Interlocutory Order for Completion of Pleadings on or before November 30, 1981 (Meyer, J.).
Nov. 16	Prayer for Assignment of trial date is Denied without prejudice pending completion of pleadings (Prince, J.). Notice Sent. (See P#1).
Nov. 23	Summons & Order of Notice returned.
Nov. 30	ANSWER.
Dec. 14	Motion of plff. to Advance.
Dec. 23	Motion (P#6) Allowed. (Prince, J.).
Dec. 23	ORDER: It is hereby Ordered that the above entitled action be placed on the W.J.L. for hearing in the advanced section during the week of February 8, 1982. First Case Out. Re: Merits. (Prince, J.). Notice sent. 12-28-81.

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS. SUPREME JUDICIAL COURT
No. 79-388

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY
PLAINTIFF

v.

COMPLAINT

GEORGE P. ADAMS
JOHN J. O'LEARY
RICHARD J. GUINEY
ANTHONY B. ROMANO
RALPH W. NORMAN
RICHARD C. BRANSON
DONALD J. FARQUHARSON
JAMES J. SLATTERY
BERNARD CORBETT
DEFENDANTS
Individually and in their representative capacities

TO THE HONORABLE, THE JUSTICES OF THE SUPREME JUDICIAL COURT:

1. This proceeding is a Petition for Declaratory relief under the provisions of General Laws Chapter 231A.

2. The provisions of General Laws Chapter 150C relating to the validity and enforceability of collective bargaining agreements are not applicable to the Plaintiff.

3. — The Plaintiff, Massachusetts Bay Transportation Authority is a body politic and corporate and a political subdivision of the Commonwealth of Massachusetts under the provisions of General Laws Chapter 161A, Section 2, and has its principal place of business in the City of Boston, County of Suffolk, Commonwealth of Massachusetts.

4. The Defendants are:

George P. Adams, Vice President, Acting President and Acting Business Manager, 195 Union Street, South Weymouth, within the County of Norfolk;

John J. O'Leary, Financial Secretary-Treasurer, 6 Presentation Road, Brighton, within the County of Suffolk;

Richard J. Guiney, Recording Secretary, 215 South Street, Avon, within the County of Essex;

Anthony B. Romano, Assistant Secretary, 52 Lincoln Street, Revere, within the County of Suffolk;

Ralph W. Norman, Executive Board Member, 56 Oak Hill Road, East Weymouth, within the County of Norfolk;

Richard C. Branson, Executive Board Member, 66 Collincotte Street, Stoneham, within the County of Middlesex;

Donald J. Farquharson, Executive Board Member, 17 Roslin Street, Dorchester, within the County of Suffolk;

James J. Slattery, Executive Board Member, 123 Hanian Drive, Weymouth, within the County of Norfolk;

Bernard Corbett, Executive Board Member, 142 Marine Road, South Boston, within the County of Suffolk

and are all members of the Boston Carmen's Union, Division 589, Amalgamated Transit Union, AFL-CIO-CLC; a voluntary unincorporated Association; the officers and Executive Board of which are authorized to enter into collective bargaining agreements with your Plaintiff in behalf of the members of said Amalgamated Transit Union, Division 589.

5. The above-named members of the aforesaid Amalgamated Transit Union, Division 589, are sued herein individually and in the representative capacities. All the members of said Amalgamated Transit Union, Division 589, have not been made defendants since by reason of the fact that there are approximately forty-five hundred (4500) members in

number and it would be impracticable to bring them all before the Court, but the suit is of common and general interest to each and all members of said Division 589, and any one or more of the individual Defendants named in this Complaint will insure adequate representation of all members of said Division 589.

6. All of the aforesaid persons are joined in one action as defendants because there is asserted against them jointly and severally rights to relief arising out of the same transaction, occurrence or series of transactions and as such should be considered and construed as a class action involving all of the membership of Local 589.

7. The Plaintiff, M.B.T.A., is a recipient of federal funds obtained through grants issued to the Plaintiff by the United States Department of Transportation through its Urban Mass Transportation Administration under provisions of the Urban Mass Transit Act of 1964, as from time to time amended. (49 U.S.C.A. Section 1601 et seq.) Section 13(c) of said Urban Mass Transit Act (49 U.S.C.A. Section 1609(c)) provides that it be a condition of assistance under the Act that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. A copy of said Section 13(c) is attached hereto as Attachment "A."

8. In administering the foregoing section, the Secretary of Labor has made provisions whereby the rights of said employees are protected by means of an agreement entered into between the grantee of federal funds and labor organizations representing employees affected thereby.

9. In pursuance of the foregoing policy the Plaintiff, M.B.T.A., entered an agreement with the Defendant, Local 589, dated December 10, 1974, a copy of which is annexed hereto as Attachment "B."

10. The Agreement contained in Attachment "B", attached hereto, has been accepted by the Secretary of Labor satisfying the requirements of Section 13(c).

11. Federal grants made to the M.B.T.A. as alleged in paragraph 7 have been made predicated upon the Agreement set forth in Attachment "B."

12. By the provisions of Section 4 of Attachment "B", it is provided that collective bargaining rights of the M.B.T.A.'s employees represented by the Defendant shall be maintained to the extent that such rights are provided for by applicable laws and/or existing collective bargaining agreements or otherwise.

13. At the time the Agreement, Attachment "B", was executed, the collective bargaining rights of the employees represented by the Defendant were governed by the provisions of Massachusetts General Laws Chapter 161A, Section 19, (Attachment "C").

14. The collective bargaining agreement between the Plaintiff and the Defendants in effect in 1974 when the 13(c) agreement was executed contained in Section 103 language relating to arbitration, which is set forth in Attachment "D."

15. The collective bargaining agreement in effect in 1974 related to the period from January 1, 1973 to December 31, 1975. An Arbitration Award dated May 19, 1976, extended the collective bargaining agreement containing the aforesaid arbitration provisions.

16. The Arbitration Award of May 19, 1976 provided as follows in Section 1 of said award:

> "The term of the Agreement to replace the preceding Agreement shall be for two years, effective January 1, 1976 to December 31, 1977."

17. In 1978 the Legislature of the Commonwealth of Massachusetts enacted Chapter 405 of the Acts of 1978 which amended said Section 19 of Chapter 161A, by setting forth provisions applicable to certain arbitration procedures. A copy of Chapter 405 is attached hereto as Attachment "E."

18. A controversy has arisen between the Plaintiff and the Defendants as to the effect of said Chapter 405 of the Acts of 1978 as it may affect the "13(c) Agreement" as set forth in Attachment "B."

19. The Defendants invoked the provisions of Section 13(a)(1) of Attachment "B" seeking to have the controversy arbitrated.

20. Subject to objection and reservation of rights by the Plaintiff, the matter was arbitrated. An Award was issued by the Arbitrator dated August 13, 1979, a copy of which is attached hereto as Attachment "F."

21. The foregoing Arbitration Award provided that:

> "The July 10, 1978 amendments to Section 19 of Chapter 161A of the General Laws, and the M.B.T.A.'s insistence on arbitrating interest disputes pursuant to those amendments, constitutes a conflict with the pre-existing 13(C) Agreements executed by the parties."

22. The Plaintiff requests that the Court make a binding declaration of the right, duty and status as follows:

> a. The provisions of Chapter 405 of the Acts of 1978 are not inconsistent with the 13(c) Agreement set forth in Attachment "B."
>
> b. The provisions of Section 4 of the 13(c) Agreement set forth in Attachment "B" preserving collective bargaining rights of the Defendant are not violated by Chapter 405 of the Acts of 1978.

c. Employees represented by the Defendant Union are required to comply with the provisions of Chapter 405 of the Acts of 1978.

d. In issuing the award contained in Attachment "F", the Arbitrator exceeded the powers given to him under the provisions of Section 13(b) of the 13(c) Agreement set forth in Attachment "B".

e. The Award of the Arbitrator set forth in Attachment "F" constitutes an unauthorized interpretation of a statute of the Commonwealth of Massachusetts.

f. The Award of the Arbitrator as set forth in Attachment "F" should be vacated.

g. For such other declarations as the Court may deem appropriate in the circumstances.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

By its attorneys,

/s/ _____

Joseph H. Elcock, General Counsel
50 High Street, Boston, MA 02110
722-3156

/s/ _____

Joseph A. Emerson, Special Counsel
One Boston Place, Boston, MA 02108
542-6666

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
No. 79-388

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,
PLAINTIFF

v.

GEORGE P. ADAMS, JOHN J. O'LEARY,
RICHARD J. GUINEY, ANTHONY B. ROMANO,
RALPH W. NORMAN, RICHARD C. BRANSON,
DONALD J. FARQUHARSON, JAMES J. SLATTERY,
AND BERNARD CORBETT,
DEFENDANTS.

ANSWER

All Defendants, officers of Local 589, Amalgamated Transit Union, in answer to the Complaint filed in this action, state as follows:

1. Paragraphs 1, 2, 3, 4, 5, and 6 are admitted.
2. Paragraph 7 is admitted, and Defendants note that Plaintiff has applied for and received federal monetary assistance under Sections 1601, *et seq.* on more than 110 separate occasions, and has received many millions of dollars as a result.
3. Paragraph 8 is admitted.
4. Paragraph 9 is admitted, and Defendants note that eight labor protection agreements have negotiated between the parties since 1966. Each remains in effect and none

differs from the 1974 agreement (Attachment B of the Complaint) in any material respect. On two occasions, the MBTA received federal assistance even though no 13(c) agreement had been concluded. The U.S. Department of Labor demanded and received from the MBTA certain warranties for the benefit of MBTA employees in lieu of a 13(c) agreement. One such letter of warranty is attached as Exhibit "A."

5. Paragraphs 10 and 11 are admitted.
6. Paragraph 12 is admitted. Defendant notes that the phrase "as provided for by applicable laws and/or existing collective bargaining agreements or otherwise" refers to laws which existed at the time the agreement was executed, and not to later-enacted "applicable laws," as the MBTA contended in arbitration and contends here. Arbitrator William J. Fallon upheld the Union interpretation of the 1974 agreement (Complaint, Attachment F, page 26).
7. Paragraph 13 is admitted.
8. Paragraphs 14, 15 and 16 are admitted. Defendants note that the interest arbitration provisions of the parties' collective bargaining agreement remain a part of the current agreement. The pension agreement will terminate on December 31, 1979, and the parties are now negotiating, in an attempt to reach a new agreement.
9. Paragraph 17 is admitted.
10. Paragraph 18 is admitted to the extent that it alleges that a controversy between the parties arose. The controversy, however, concerned the meaning of the 13(c) agreements. The meaning of Chapter 405 has never been disputed.
11. Paragraphs 19, 20 and 21 are admitted.

12. Defendants deny that the Plaintiff is entitled to any of the relief requested.

GEORGE P. ADAMS, JOHN J. O'LEARY, RICHARD J. GUINEY, ANTHONY B. ROMANO, RALPH W. NORMAN, RICHARD C. BRANSON, DONALD J. FARQUHARSON, JAMES J. SLATTERY, AND BERNARD CORBETT

/s/ _____

Harold B. Roitman
Segal, Roitman & Coleman
11 Beacon Street
Boston, Mass. 02108
(617) 742-0208

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. 79-388 CIVIL

COMPLAINT OF THE COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS,
BY FRANCIS X. BELLOTTI, AS HE IS ATTORNEY GENERAL
THEREOF, AND MASSACHUSETTS BAY
TRANSPORTATION AUTHORITY,
PLAINTIFFS,

VS.

LOCAL DIVISION 589, AMALGAMATED TRANSIT
UNION, AFL-CIO, CLC, JOHN J. GALLAHUE,
INDIVIDUALLY AND IN HIS CAPACITY AS
PRESIDENT OF LOCAL DIVISION 589,
PAUL CONNOLLY, INDIVIDUALLY AND IN HIS CAPACITY AS
VICE PRESIDENT OF LOCAL DIVISION 589,
JOHN J. O'LEARY, INDIVIDUALLY AND IN HIS CAPACITY AS
FINANCIAL SECRETARY OF LOCAL DIVISION 589,
ANTHONY B. ROMANO, INDIVIDUALLY AND IN HIS CAPACITY
AS ASSISTANT SECRETARY OF LOCAL DIVISION 589,
REDMOND CONDON, INDIVIDUALLY AND IN HIS CAPACITY AS
EXECUTIVE BOARD MEMBER OF LOCAL DIVISION 589,
RICHARD C. BRANSON, INDIVIDUALLY AND IN HIS CAPACITY
AS EXECUTIVE BOARD MEMBER OF LOCAL DIVISION 589,
JOHN S. WEBER, INDIVIDUALLY AND IN HIS CAPACITY AS
EXECUTIVE BOARD MEMBER OF LOCAL DIVISION 589,
STANLEY STEARNS, INDIVIDUALLY AND IN HIS CAPACITY AS
EXECUTIVE BOARD MEMBER OF LOCAL DIVISION 589,

BERNARD CORBETT, INDIVIDUALLY AND IN HIS CAPACITY AS EXECUTIVE BOARD MEMBER OF LOCAL DIVISION 589, RICHARD J. GUINEY, INDIVIDUALLY AND IN HIS CAPACITY AS RECORDING SECRETARY OF LOCAL DIVISION 589, DEFENDANTS.

Nature of Action.

1. The Commonwealth of Massachusetts, by its Attorney General, brings the present action in order to enforce Chapter 405 of the Massachusetts Acts of 1978. Chapter 405 regulates mediation and arbitration of collective bargaining impasses between the Massachusetts Bay Transportation Authority (M.B.T.A.) and the unions representing M.B.T.A. employees. The Commonwealth seeks a declaratory judgment that Chapter 405 does not violate any contract or agreement between the M.B.T.A. and the defendant Union, or any applicable law. The Commonwealth seeks conforming injunctive relief requiring the defendant Union and its members to comply with Chapter 405.

Jurisdiction.

2. This Court has jurisdiction over this action pursuant to G.L. c. 211; c. 214, § 1; and c. 231A.

Related Litigation.

3. Certain of the issues raised in this case are also raised in the case of *Local Division 589 v. Commonwealth, et al,* U.S. District Court No. 79-2058-N, presently pending before Judge

Walter J. Skinner. The latter case was filed after the case at bar had been removed to federal court.

Parties.

4. The Commonwealth of Massachusetts is a sovereign state of the United States. Francis X. Bellotti is the Attorney General of the Commonwealth of Massachusetts, and is empowered to enforce Massachusetts statutes. G.L. c. 12, §§ 3, 10. The Attorney General brings this action in the name of the Commonwealth and in the public interest.

5. The defendant Local Division 589, Amalgamated Transit Union, AFL-CIO, known as the Boston Carmen's Union, is an unincorporated association doing business in Massachusetts as a public employee labor union. Local Division 589 represents in labor matters the majority of the operating, maintenance and clerical personnel employed by the Massachusetts Bay Transportation Authority.

6. The following defendants are members and officials of defendant Local Division 589. The Commonwealth sues them individually and in their representative capacities. They and Local Division 589 are henceforth referred to collectively as the "Union":

(a) John J. Gallahue, Jr. is a resident of Milton, Massachusetts, and is President and Business Agent of Local Division 589;

(b) Paul Connolly is a resident of West Quincy, Massachusetts, and is Vice President of Local Division 589;

(c) John J. O'Leary is a resident of Brighton, Massachusetts, and is Financial Secretary of Local Division 589;

(d) Richard J. Guiney is a resident of Norwell, Massachusetts, and is Recording Secretary of Local Division 589;

(e) Anthony B. Romano is a resident of Revere, Massachusetts, and is Assistant Secretary of Local Division 589;

(f) Redmond Condon is a resident of Wrentham, Massachusetts, and is an Executive Board Member of Local Division 589;

(g) Richard C. Branson is a resident of Stoneham, Massachusetts, and is an Executive Board Member of Local Division 589;

(h) John S. Weber is a resident of Watertown, Massachusetts, and is an Executive Board Member of Local Division 589;

(i) Stanley Stearns is a resident of Braintree, Massachusetts, and is an Executive Board Member of Local Division 589;

(j) Bernard Corbett is a resident of Methuen, Massachusetts, and is an Executive Board Member of Local Division 589.

Facts.

7. The Massachusetts Bay Transportation Authority (M.B.T.A.) is a public body and a political subdivision of the Commonwealth of Massachusetts. It was created by G.L. c. 161A. The M.B.T.A. maintains and operates mass transit facilities in the greater Boston area. The residents of seventy-eight cities and towns in eastern Massachusetts presently depend on the M.B.T.A. for public train, trolley and bus service. A copy of relevant portions of Chapter 161A appears as Item A of the Appendix to this complaint.

8. The M.B.T.A. presently employs over 6,000 persons. Its current payroll is over $100,000,000 per year. M.B.T.A. pay-

roll costs, to the extent not covered by fare receipts, are paid by levies on the seventy-eight cities and towns, by the Commonwealth, and by federal government grants, out of public revenues.

A. *History of M.B.T.A. Collective Bargaining.*

9. The Metropolitan Transit Authority (M.T.A.), the predecessor of the M.B.T.A., was created by Chapter 544 of the Acts of 1947. That law authorized the Commonwealth of Massachusetts to purchase the existing facilities of the Boston Elevated Railway Company, a private corporation, and created the M.T.A., a public body, to operate mass transit facilities in the Boston metropolitan area.

10. The 1947 statute which created the M.T.A. authorized its directors to bargain collectively with M.T.A. employees and to engage in binding arbitration of labor disputes. M.T.A. workers were the first employees in Massachusetts granted the right to binding arbitration by the Legislature.

11. In 1964, the 1947 M.T.A. Act was amended to create the M.B.T.A. (St. 1964, c. 563, § 18). The 1964 statute also permitted the M.B.T.A. Board of Directors to participate in collective bargaining and binding arbitration of labor disputes with M.B.T.A. employees.

12. Between 1964 and 1981 the M.B.T.A., under the authority of G.L. c. 161A, and the defendant Union negotiated a series of collective bargaining agreements. These agreements determined the wages and work rules for Union employees at the M.B.T.A. In 1973, in particular, the M.B.T.A. and the Union entered into one such collective bargaining agreement ("1973 Collective Bargaining Agreement" or "1973 Agreement"). A true copy of the 1973 Agreement is attached as Item B of the Appendix to this complaint.

13. The 1973 Collective Bargaining Agreement expired in December, 1975. It was extended by an arbitration award and again expired in December, 1977. In early 1978 the M.B.T.A. and the defendant Union sought to negotiate the terms of a new collective bargaining agreement.

14. As a result of a series of collective bargaining agreements which had culminated in the 1973 Agreement, wages paid to members of the defendant Union in 1978 were extraordinarily high. M.B.T.A. workers earned substantially higher wages than Massachusetts workers who performed comparable jobs in both the public and private sectors.

15. The 1973 Collective Bargaining Agreement also maintained restrictive work rules which seriously obstructed the efficient management and operation of the M.B.T.A. For example, as a result of jurisdictional boundaries between various Union job classifications enforced by the 1973 Agreement, multiple employees were required to perform portions of repair and maintenance jobs, even when the job could be performed less expensively and more efficiently by a single employee.

16. As a result of the high wages and restrictive work rules created by the 1973 and earlier collective bargaining agreements, M.B.T.A. service had become extremely costly. In 1978, the M.B.T.A.'s cost per mile of operation was nearly twice as much as that of the next most expensive American system, the Bay Area Rapid Transit System of San Francisco.

17. The cost-of-living provisions and arbitration mechanism set forth in Section 503 of the 1973 Collective Bargaining Agreement gave the defendant Union little incentive to engage in good faith collective bargaining to fix the terms of any future agreement, in that Union members received automatic quarterly cost-of-living adjustments even after the Agreement "expired" in 1975 and 1977.

18. As evidenced by the conditions described above, the collective bargaining process authorized by the 1947 and 1964 Massachusetts M.B.T.A. statutes no longer functioned in the public interest.

B. *The 1978 Mediation and Arbitration Law.*

19. On July 13, 1978, the Massachusetts Legislature enacted Chapter 405 of the Acts of 1978 ("1978 mediation and arbitration law" or "1978 law") to reform the mechanism for the mediation and binding arbitration of contract disputes between the M.B.T.A. and its employees. The 1978 law, which the plaintiff seeks to enforce, is embodied in G.L. c. 161A, §§ 19A-19G, which appears as Item A of the Appendix to this complaint. It includes the following pertinent provisions:

(a) The M.B.T.A. and the defendant Union are encouraged to negotiate, and are prohibited from engaging in either mediation or arbitration, until ninety days after the expiration of the collective bargaining agreement previously in effect. During the ninety-day negotiation period, as well as during any subsequent mediation and arbitration proceeding, the wages paid to M.B.T.A. employees under their expired contract continue unchanged. No periodic cost-of-living increases are paid during this period. G.L. c. 161A, §§ 19D and 19G.

(b) At the expiration of the ninety-day negotiation period, either party may request mediation of remaining contract disputes. G.L. c. 161A, § 19D.

(c) If mediation is not successful within forty-five days, either party may request that the remaining disputes be submitted to binding arbitration. G.L. c. 161A, § 19D.

(d) The 1978 mediation and arbitration law specifies a procedure and criteria for the conduct of binding arbitration at the M.B.T.A. It requires, *inter alia*, that arbitration be con-

ducted by a single neutral arbitrator mutually agreed to by the parties, or selected by them from a list supplied by the American Arbitration Association; that the arbitrator be a legal resident of the Commonwealth and be experienced in state and local finance; and that the arbitrator rely primarily on certain factors in making an award. Those factors include, for example, a comparison of wages and working conditions of M.B.T.A. employees with workers performing similar services in the private and public sectors within the Commonwealth, changes in the cost of living, and other factors "normally or traditionally taken into consideration" in contract arbitration. G.L. c. 161A, §§ 19E and 19F.

20. Until the enactment of the 1978 mediation and arbitration law, Massachusetts statutes had specified no procedure whatsoever for the bargaining, mediation, or arbitration of M.B.T.A. contracts.

21. After the enactment of the 1978 mediation and arbitration law, the M.B.T.A. requested the defendant Union to mediate, in accordance with the immediately effective provisions of the 1978 law, those disputes which had not been resolved by the negotiation mentioned in paragraph 13. The Union agreed to and did engage in mediation in compliance with the law.

22. After mediation failed to achieve agreement, the defendant Union refused to follow the binding arbitration procedure specified by the 1978 law. The Union claimed that the 1978 law (1) violated arbitration provisions in the 1973 Collective Bargaining Agreement (Item B to the Appendix) and (2) violated separate agreements entered into by the parties under the authority of Section 13(c) of the Urban Mass Transportation Act ("U.M.T.A."), 49 U.S.C. § 1609(c).

C. *Background of U.M.T.A.*

23. The Urban Mass Transportation Act was enacted by Congress in 1964 to provide federal funds to local public transit authorities for operating expenses and capital expenditures. 49 U.S.C. §§ 1601, 1602(a) and (h). On numerous occasions since 1964, the M.B.T.A. has received both operating and capital funding under U.M.T.A. This funding is essential to the maintenance of present M.B.T.A. service.

24. U.M.T.A. contains a provision known as "Section 13(c)," which requires that before any local transit authority may receive money under the authority of U.M.T.A, the U.S. Secretary of Labor must determine that "fair and equitable arrangements are made . . . to protect the interests of employees affected by such assistance." Section 13(c) was enacted by Congress to protect transit employees from layoffs and dislocation because of automation and operating changes brought about by the receipt of federal funds, and from the loss of the right to bargain collectively caused by U.M.T.A.-financed public takeovers of private transit companies where such a right had previously existed. A true copy of Section 13(c) is attached as Item C of the Appendix to this complaint.

25. U.M.T.A. contains no mediation or arbitration provisions. It was not the intent of Congress in enacting U.M.T.A. to affect in any way mediation or arbitration of labor disputes as provided under state laws.

26. The 1978 mediation and arbitration law was not enacted as the result of any federal funding granted under U.M.T.A., nor was its passage due to the effect of any U.M.T.A.-financed project. The 1978 law, and the refusal of the defendant Union to abide by that law, have no causal connection whatsoever with U.M.T.A. The present controversy results solely from the Massachusetts Legislature's concern with the results of arbitration under state labor laws which

were in effect 17 years before the passage of U.M.T.A., and the Legislature's decision in 1978 to amend those laws.

D. *The 1974 Section 13(c) Agreement.*

27. In 1974 the M.B.T.A. entered into an agreement with the defendant Union, under the aegis of Section 13(c) of U.M.T.A. ("1974 13(c) Agreement"). A true copy of the 1974 13(c) Agreement is attached as Item D of the Appendix to this complaint.

28. The 1974 13(c) Agreement deals primarily with protective provisions for M.B.T.A. employees laid off or otherwise dislocated as a result of projects and improvements funded by U.M.T.A. Of the twenty-three paragraphs of the 1974 13(c) Agreement, only Paragraphs 4 and 13 mention arbitration; none mentions mediation. Paragraph 4 provides in relevant part that "The collective bargaining rights of employees of the Authority . . . including the right to arbitrate labor disputes . . . to the extent that such are provided for by applicable laws and/or existing collective bargaining agreements, or otherwise shall be preserved and continued."

29. On September 12, 1978, in response to Union assertions that the invocation of the arbitration provisions of the 1978 mediation and arbitration law violated the 1974 Section 13(c) Agreement, the Secretary of Labor requested the M.B.T.A. and the Union to arbitrate the matter pursuant to provisions of the Agreement.

30. The Secretary of Labor lacked legal authority, under Section 13(c) or otherwise, to request the M.B.T.A. and the Union to arbitrate this dispute.

31. The M.B.T.A. and the defendant Union went to arbitration under Paragraph 13 of the 1974 Section 13(c) Agreement. On August 13, 1979, an arbitrator issued an award which, in its entirety, stated:

AWARD

> The July 10, 1978, amendments to Section 19 of Chapter 161A of the General Laws, and the M.B.T.A.'s insistence on arbitrating interest disputes pursuant to those amendments, constitutes a conflict with the pre-existing 13(c) Agreements executed by the parties.

The arbitrator did not direct either the M.B.T.A. or the defendant Union to take any action in response to his award. The arbitrator exceeded his jurisdiction and authority by his interpretation of the requirements of state and federal legislation in this award.

32. On August 8, 1979, prior to the arbitrator's ruling, the M.B.T.A. and the defendant Union signed a "Memorandum of Understanding" reinstituting the 1973 Collective Bargaining Agreement with specified changes, and continuing it in force through December 31, 1980. The Memorandum was approved by counsel for the M.B.T.A. "to the extent not inconsistent with" the 1978 mediation and arbitration law. A true copy of the 1979 Memorandum of Understanding is attached as Item E of the Appendix to this complaint.

33. After the 1978 mediation and arbitration law was enacted, seven other M.B.T.A. unions, representing more than 1,500 employees, agreed to changes in the language of their collective bargaining agreements to recognize the effect of the new statute. On September 10, 1980, the M.B.T.A. Police union completed arbitration under the provisions of the 1978 statute.

E. *The Immediate Controversy.*

34. During the summer and early fall of 1980, the M.B.T.A. and the defendant Union negotiated for a new contract covering wages and working conditions for the period after December 31, 1980.

35. On September 30, 1980 the defendant Union declared an impasse in the negotiations and demanded arbitration under the 1973 Collective Bargaining Agreement.

36. The defendant Union refused to comply with those provisions of the 1978 mediation and arbitration law which require (1) that the parties negotiate in an effort to reach voluntary agreement, for ninety days after the expiration of the contract; (2) that the parties then engage in mediation of any remaining disputes for up to forty-five days before resorting to arbitration; and (3) that arbitration follow the procedure and criteria specified in the 1978 law.

37. On or about November 6, 1980, the M.B.T.A. refused to proceed to arbitration under the 1973 Agreement and stated its intent to comply with the 1978 mediation and arbitration law.

Causes of Action.

38. The defendant Union's failure to continue to negotiate its dispute with the M.B.T.A. over the terms of a new collective bargaining agreement violates G.L. c. 161A, as amended by Chapter 405 of the Acts of 1978.

39. The defendant Union's demand that its dispute with the M.B.T.A. over the terms of a new collective bargaining agreement be arbitrated under the provisions of the 1973 Collective Bargaining Agreement violates G.L. c. 161A, as amended by Chapter 405 of the Acts of 1978.

40. The arbitrator exceeded his legal authority in issuing his August 13, 1979 Award.

Irreparable Harm.

41. If the M.B.T.A. yields to the defendants' demands and disregards the negotiation and mediation provisions of the

1978 mediation and arbitration law, arbitration will proceed and the positions of the M.B.T.A. and the defendant Union will become more rigid. After the entry of an award, neither side will be able, as a practical matter, to retreat from any gain. If arbitration proceeds, the opportunity for good-faith mediation and voluntary agreement, as contemplated by the Massachusetts Legislature in enacting the 1978 law, will be irretrievably lost.

42. If the M.B.T.A. is forced by the Defendants to go to arbitration under the 1973 Collective Bargaining Agreement, any resulting agreements on issues and the arbitration award will differ substantially from the agreements and award which would have been entered if arbitration had been conducted under the 1978 mediation and arbitration law. It will be impossible for any reviewing court later to retrace the arbitration process or to correct its results so as to conform to the results of arbitration carried out under the 1978 statute.

43. The plaintiff has no adequate remedy at law.

Relief.

WHEREFORE, the plaintiff prays this Court:

1. After a hearing on the merits, to enter a declaratory judgment:

(a) that G.L. c. 161A, as amended by Chapter 405 of the Acts of 1978, is not inconsistent with or in violation of any agreement entered into by the M.B.T.A. with the defendant Union pursuant to Section 13(c) of U.M.T.A. or with any applicable collective bargaining agreement between the parties; and

(b) that to the extent any provision of any agreement entered into by the M.B.T.A. with the defendant Union pursuant to Section 13(c) of U.M.T.A., or any applicable

collective bargaining agreement, conflicts with the terms of G.L. c. 161A, as amended by Chapter 405 of the Acts of 1978, the M.B.T.A. exceeded its legal authority in signing said agreement, and said provision is null and void.

2. After a hearing on the merits, enter a Permanent Injunction enjoining the defendant Union and each of the named individual defendants, their officials, attorneys, agents, servants, and employees, and all those in active concert or participation with them, from either invoking arbitration or proceeding to arbitration in any disagreement with the Massachusetts Bay Transportation Authority concerning the terms of a new collective bargaining agreement, except in accordance with the provisions of G.L. c. 161A, as amended by Chapter 405 of the Acts of 1978.

3. Order such other and further relief as is just.

FRANCIS X. BELLOTTI
ATTORNEY GENERAL OF THE
COMMONWEALTH OF
MASSACHUSETTS

/s/ _____
Dwight Golann
Assistant Attorney General
Public Protection Bureau

/s/ _____
Bruce Mohl
Assistant Attorney General
Government Bureau

/s/ _____
Mitchell J. Sikora, Jr.
Assistant Attorney General
Government Bureau

/s/ _____
Stephen M. Limon
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Public Protection Bureau

One Ashburton Place
Boston, Massachusetts 02108
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Date: February 4, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DOCKET ENTRY
CIVIL ACTION NO. 79-2059-S

GEORGE P. ADAMS, ET AL.,
PETITIONERS,

v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,
RESPONDENT.

MEMORANDUM AND ORDER

December 24, 1980

SKINNER, D.J.

Respondent Massachusetts Bay Transportation Authority [MBTA] brought this action in the Supreme Judicial Court of Massachusetts pursuant to M.G.L. c. 231A to vacate an arbitration award issued under a labor agreement that the MBTA and Local Division 589, Amalgamated Transit Union [Local 589] entered into pursuant to § 13(c) of the Urban Mass Transportation Act of 1964 [UMTA], 49 U.S.C. § 1609(c). Petitioners Adams et al., who are officers of Local 589 and defendants in the state court action, seek to have this case removed to federal court pursuant to 28 U.S.C. § 1441(b).

Section 13(c) of UMTA provides that as a condition to receiving federal assistance for urban transportation projects, state and local agencies must make "fair and equitable

arrangements . . . as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance." To implement this section, the Department of Labor has promoted the negotiation of labor protective agreements, the so-called § 13(c) agreements, between state transit authorities and their employees' collective bargaining representatives. The § 13(c) agreements are incorporated into the grant contract between the federal government and the transit authority.

In December of 1974, the MBTA entered into a § 13(c) agreement with Local 589. Section 4 of this agreement provides:

> The collective bargaining rights of employees of the Authority represented by Labor Organizations signatory hereto including the right to arbitrate labor disputes and to maintain union security and check-off arrangements, to the extent such are provided for by applicable laws and/or existing collective bargaining agreements, or otherwise shall be preserved and continued.

At the time this agreement was made, the parties had a collective bargaining agreement which stipulated a specific procedure for interest arbitration between the MBTA and its employees. On July 13, 1978, the Massachusetts Legislature enacted Chapter 405 of the Acts of 1978, amending M.G.L. c. 161A § 19, which mandates a different procedure for interest arbitration than that contained in the parties' original collective bargaining agreement.[1]

Subsequently, on September 22, 1978, Local 589 invoked the arbitration provision of the parties' § 13(c) agreement to

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[1] The details of the collective bargaining agreement and Chapter 405 need not be considered in ruling on this petition.

determine whether Chapter 405 conflicts with the employees' right to interest arbitration established under the § 13(c) agreement. The MBTA consented to such arbitration but reserved its rights to assert in the invalidity of the procedure. Local 589 argues that the § 13(c) agreement preserved the employees' right to interest arbitration according to the procedures set out in the parties' 1974 collective bargaining agreement, and that the Legislature could not alter this right through Chapter 405. The MBTA contended that the § 13(c) agreement permits the Legislature to change the procedures for interest arbitration and, therefore, that the parties must arbitrate interest disputes pursuant to the new procedures in Chapter 405.

The Arbitrator ruled in favor of Local 589 on August 13, 1979. The award states:

> The July 10, 1978 amendments to Section 19 of Chapter 161A of the General Laws, and the M.B.T.A.'s insistence on arbitrating interest disputes pursuant to those amendments, constitutes a conflict with the pre-existing 13(C) [sic] Agreement executed by the parties.

The MBTA then brought a declaratory action in the Supreme Judicial Court of Massachusetts, pursuant to M.G.L. c. 231A, seeking a declaration that: (1) Chapter 405 is not inconsistent with the § 13(c) agreement; (2) Chapter 405 does not violate § 4 of the § 13(c) agreement; (3) employees represented by Local 589 must comply with Chapter 405; (4) the Arbitrator exceeded his powers under section 13(b) of the § 13(c) agreement in issuing the award; (5) the Arbitrator's award constitutes an unauthorized interpretation of state law; and (6) the Arbitrator's award should be vacated. The petitioners now seek to remove this action to federal court pursuant

to 28 U.S.C. § 1441(b) on the ground that the MBTA's complaint states a federal cause of action.

28 U.S.C. § 1441(b) provides in part: "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to citizenship or residence of the pajties." The principal inquiry in this case is whether the MBTA could have brought its declaratory action originally in federal court.

The petitioners argue that the Court of Appeals decision in *Local Division No. 714* v. *Greater Portland Transit District*, 589 F.2d 1 (1st Cir. 1978), supports their petition for removal. In *Greater Portland*, the Portland Transit District refused to go to arbitration under the terms of a § 13(c) agreement. The Union then brought suit in federal district court to enforce the arbitration provision of the agreement, relying on 28 U.S.C. § 1331 for jurisdiction. The District Court determined that it lacked jurisdiction over the case. On appeal, the Court of Appeals sought to identify the theory of recovery set out in the Union's complaint. At its narrowest, the complaint merely showed a violation of a private contractual agreement. At its broadest, it showed a violation of § 13(c) of UMTA on the theory that § 13(c) commands interest arbitration. The Court chose a middle ground: the complaint showed a § 13(c) violation because § 13(c) directs a transit district to comply with the § 13(c) agreements it enters into and implies a federal remedy for breach thereof in favor of the transit district's employees. The Court held, accordingly, that the complaint stated a claim "arising under" federal law for purposes of jurisdiction under § 1331. The Court also considered whether the Union had an implied private federal remedy under UMTA to enforce the § 13(c) agreements. Analyzing this question in view of *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), the Court found that the four *Cort* factors were met under the circumstances,

i.e., (1) the transit district's employees are a class for whose especial benefit § 13(a) was enacted; (2) there is ample indication of legislative intent to create a remedy; (3) it is consistent with the underlying scheme of § 13(c) to imply such a remedy, and (4) enforcement of the § 13(c) agreements is not a function traditionally relegated to the states. The Court thus held that there exists an implied private right of action in favor of unions to enforce § 13(c) agreements.

The present action is distinguishable from *Greater Portland*. In *Greater Portland*, the Court found jurisdiction on the ground that the Union's complaint showed a violation of § 13(c). Here, however, the MBTA's state court complaint cannot be construed to state a § 13(c) violatin. As indicated in *Greater Portland*, § 13(c) was enacted for the benefit of the transit district's employees. That section confers no rights on the transit district itself; it is, in effect, a one-way street in favor of the employees. Thus, the MBTA's action to vacate the arbitrator's award under the § 13(c) agreement does not satisfy the test of *Cort* v. *Ash, supra*. Although the resolution of this action involves the interpretation of a federally-mandated contract and federal constitutional issues lurk in the background, the action itself does not "arise under" federal law. *See Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149 (1908). This court, therefore, lacks subject matter jurisdiction. The petition for removal must be denied and the case remanded to the Supreme Judicial Court.

That is not the end of the matter, however. Local 589 has instituted a separate action against the MBTA in this court concerning the same subject matter as the MBTA's state court complaint, *Local Division 589, Amalgamated Transit Union, AFL-CIO, CLC* v. *The Commonwealth of Massachusetts, The Massachusetts Bay Transportation Authority and Robert Foster*, C.A. 79-2058-S. The Local filed its complaint on October 15, 1979 seeking a declaratory judgment that the parties'

§ 13(c) agreement requires continuation of interest arbitration procedures found in prior collective bargaining agreements and that Chapter 405 of the laws of 1978 does not vary the employees' right to interest arbitration. The complaint alleges a violation of the § 13(c) agreement and raises issues under the supremacy and contract clauses of the United States Constitution. Local 589's case is thus within this court's original federal question jurisdiction under 28 U.S.C. § 1331. *See Greater Portland, supra.*

If, when this case is remanded to the Supreme Judicial Court, the § 13(c) issues are determined prior to their determination in this court, that judgment will be a bar to subsequent determination of the same issues in this court, and the Union's right to a federal forum thus may be defeated.

The question then is whether this situation creates such a threat to the enforcement of federally guaranteed rights as to require a stay of state proceedings under 28 U.S.C. § 2283. I conclude that it does not. Nothing in the *Greater Portland* opinion suggests that the jurisdiction of the federal district court over § 13(c) litigation is exclusive. Nothing in this record suggests that the Supreme Judicial Court will fail to give the parties the full protection which the federal statutes and the Constitution provide. The Union's right to a federal forum is not absolute.[2]

The petition to remove is accordingly DISMISSED and the case remanded to the Supreme Judicial Court of the Commonwealth of Massachusetts.

/s/_____
United States District Judge

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[2] *Cf. International Ass'n of Machinists* v. *United Aircraft Corp.*, 333 F.2d 367 (2d Cir. 1964), *cert. denied*, 379 U.S. 946.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 79-2058-S

LOCAL DIVISION 589,
AMALGAMATED TRANSIT UNION, AFL-CIO, CLC,
PLAINTIFF,

v.

THE COMMONWEALTH OF MASSACHUSETTS, THE MASSACHUSETTS BAY TRANSPORTATION AUTHORITY, ROBERT FOSTER, CHAIRMAN OF THE BOARD, MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,
DEFENDANTS.

MEMORANDUM AND ORDER

March 9, 1981

SKINNER, D.J.

The plaintiff seeks a temporary restraining order and also a preliminary injunction enjoining lay offs of its members by defendant MBTA. The lay offs will not occur until March 21, 1981. Hearing on the preliminary injunction is scheduled for March 11, and 12, 1981. The only purpose to be served by a temporary restraining order at this stage would be to prevent the defendant from making adjustments in work assignments and schedules based upon the proposed lay offs. Such planning by the defendant does not create a risk of irreparable harm to the plaintiff, because if the plaintiff prevails on its

motion for a preliminary injunction the defendant may simply reinstate existing schedules and assignments. Any loss in terms of expense is the defendant's, and it should be free to exercise its own judgment as to the prudence of preparing schedule changes and work assignments changes at this time.

Accordingly, the motion for a temporary restraining order is DENIED.

s/ _____
United States District Judge

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, et al., Plaintiffs,

v.

The COMMONWEALTH OF MASSACHUSETTS, et al., Defendants.

Civ. A. No. 79-2058-S.

United States District Court,
D. Massachusetts.

March 17, 1981.

Unions brought action against Commonwealth and against transportation authority seeking declaration of unconstitutionality of act affecting arbitration procedures between the union and the authority and seeking injunctive relief. The District Court, Skinner, J., held that: (1) legislative act was effective to amend and add to

Thomas' name to the deputy Marshals when asked to identify himself.

collective bargaining agreement between transportation authority and unions requirements that neutral arbitrator in tripartite arbitration was to be legal resident of state and was to be experienced in state and local finance, that arbitrators rely "primarily" on eight enumerated factors in determining award, that cost-of-living adjustment awards be limited, that arbitrators inquire into financial capacity of transportation authority, and that awards could be enforced against appropriate legislative or appropriating body; however, tripartite arbitration procedure was central consideration of preexisting collective bargaining agreements, and thus statutory and constitutional prohibitions against abridgement of contract barred effectiveness of legislative enactment purportedly imposing arbitration by single arbitrator; (2) authority of transportation authority to lay off members of first union upon running out of money was subject to binding arbitration under collective bargaining agreement, which included flat prohibition against layoffs; and (3) second union was not entitled to preliminary injunction preventing layoffs ordered following expiration of collective bargaining agreement where union members to be laid off had, under previously negotiated collective bargaining agreement, no contract right to job security and no reasonable expectation of job security until they had worked 30 months.

Order accordingly.

1. Federal Courts ⇐41

Where jurisdiction of district court has properly been invoked, the court is obliged to act in absence of compelling reasons of comity and practicality.

2. Federal Courts ⇐58

District court would exercise jurisdiction over union's action against Commonwealth and transportation authority seeking declaration of unconstitutionality of act affecting arbitration procedures between the union and authority and seeking injunctive relief, despite claim that court should abstain.

3. Estoppel ⇐62.2(2)

Transportation authority was estopped to deny continuation in force of collective bargaining agreement, even though notices served by the authority and by union had cut off the "year-to-year" extended term under most recent contract, where both union and transportation authority had treated agreement as continuing in force.

4. Constitutional Law ⇐120

State may impair obligation of public body only with respect to some aspect of contract which was not central to reasonable expectations of contracting parties, and then only if impairment is reasonable and necessary in furtherance of valid state policy. U.S.C.A.Const. Art. 1, § 10, cl. 1.

5. Constitutional Law ⇐120

Legislative act was effective to amend and add to collective bargaining agreement between transportation authority and unions requirements that neutral arbitrator in tripartite arbitration was to be legal resident of state and was to be experienced in state and local finance, that arbitrators rely "primarily" on eight enumerated factors in determining award, that cost-of-living adjustment awards be limited, that arbitrators inquire into financial capacity of transportation authority, and that awards could be enforced against appropriate legislative or appropriating body; however, tripartite arbitration procedure was central consideration of preexisting collective bargaining agreements, and thus statutory and constitutional prohibitions against abridgement of contract barred effectiveness of legislative enactment purportedly imposing arbitration by single arbitrator. Urban Mass Transportation Act of 1964, § 13(c), 49 U.S.C.A. § 1609(c); U.S.C.A.Const. Art. 1, § 10, cl. 1.

6. Labor Relations ⇐434.8

Authority of transportation authority to lay off union members upon running out of money was subject to binding arbitration under collective bargaining agreement, which included flat prohibition against layoffs.

7. Labor Relations ⇐967

Union was not entitled to preliminary injunction preventing layoffs ordered following expiration of collective bargaining agreement where union members to be laid off had, under previously negotiated collective bargaining agreement, no contract right to job security and no reasonable expectation of job security until they had worked 30 months. Urban Mass Transportation Act of 1964, § 13(c), 49 U.S.C.A. § 1609(c).

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Joseph H. Elcock, Gen. Counsel, M.B.T.A., Dwight Golann, Asst. Atty. Gen., Boston, Mass., for defendants.

MEMORANDUM AND ORDER ON MOTIONS FOR PRELIMINARY INJUNCTIONS

SKINNER, District Judge.

I. *STATEMENT OF THE CASE AND PRELIMINARY FINDINGS OF FACT*

In this action the plaintiff, Local Division 589, Amalgamated Transit Union ("Transit Union") seeks declaratory and injunctive relief against the Massachusetts Bay Transportation Authority ("MBTA") and its Chairman of the Board, and also against the Commonwealth of Massachusetts in the following respects:

a. A declaration that chapter 405 of the Massachusetts Acts of 1978 (M.G.L. c.161A §§ 19 and 19C–G) (hereinafter "c.405") is not effective to alter the procedure for interest arbitration[1] contained in the Transit Union's collective bargaining agreement.

b. A mandatory injunction requiring the MBTA to proceed immediately to interest arbitration in accordance with the Transit Union's collective bargaining agreement.

c. A declaration that chapter 581 of the Massachusetts Acts of 1980 (hereinafter "c.581") purporting to prohibit the MBTA from entering into collective bargaining on a number of particular issues is invalid.

d. An injunction prohibiting the laying off of approximately 500 members of the Transit Union which is scheduled to become effective on Saturday, March 21, 1981.

Boston Lodge 264 of District 38, International Association of Machinists and Aerospace Workers (hereinafter "Machinists' Union") has been allowed to intervene on behalf of machinists employed by the MBTA, 58 of whom are scheduled to be laid off on March 21. The Massachusetts Bay Transportation Authority Advisory Board (hereinafter "Advisory Board") has appeared and argued in opposition to the positions of the plaintiff and the intervenor. The Machinists' Union takes the same position as the Transit Union, except that with respect to lay offs it asserts protection under its contract which the Transit Union does not claim. It also seeks arbitration with respect to the lay off of its 53 members.

The claims of the two unions are asserted under section 13(c) of the Urban Mass Transportation Act of 1964 ("UMTA"), 49 U.S.C. § 1609(c), the "13(c) agreement" executed by the MBTA in 1974 and the contract clause of the United States Constitution, Art. I, section 10.

In July of 1980 the Transit Union initiated collective bargaining under the then-current provisions of its collective bargaining contract. Negotiations continued until the end of September 1980 without success. As provided in the collective bargaining agreement the parties then proceeded to interest

1. "Interest arbitration" is arbitration over the terms of proposed collective bargaining agreement, as opposed to "grievance arbitration", which is arbitration of specific disputes under the terms of an existing agreement.

arbitration in the manner specified in the agreement. Thereafter the MBTA refused to participate in the selection of the third arbitrator and asserted that it was without authority to arbitrate except in accordance with c.405 of the Acts of 1978. The matter was referred to the Secretary of Labor, who apparently took the position that the contract procedure was in force by reason of section 13(c). There was apparently some further backing and filling, but as of November the parties were at a stand-off: the MBTA was willing to arbitrate only in accordance with c.405 and the unions were willing to arbitrate only in accordance with the collective bargaining agreement.

In November of 1978, the MBTA ran over its budget. The Governor exercised purported emergency powers to keep it running. In the course of the legal and legislative flurry that followed, the legislature enacted c.581 of the Acts of 1980. The Advisory Committee thereafter approved a budget for 1981 for the MBTA which was $7 million less than that for the previous year. The MBTA has scheduled cuts in service and the lay offs above referred to purportedly in an effort to reduce its expenses to the budgeted level.

II. *JURISDICTION*

Argument as to jurisdiction is foreclosed by the decision of the Court of Appeals in *Local Div. No. 714, etc. v. Greater Portland, etc.*, 589 F.2d 1 (1st Cir. 1978), as is argument as to the existence of a claim upon which relief can be granted. In that case it was held that the union had the right to enforce the terms of section 13(c) of UMTA, which meant in effect the terms of the agreement entered into in compliance with that statute. The Court recognized that by reason of the authority delegated to the Secretary of Labor the agreement might well impose requirements on a transit authority broader than the minimum requirements specified in the statute. Accordingly, the terms of the agreement are the primary source of rights and liabilities, to which the statute and its legislative history provide only the most general guide.

III. *ABSTENTION*

The defendants and the Advisory Board all urge this court to abstain because of the pendency in the state courts of several actions relating to some of the same subjects. One of these cases is *MBTA v. Adams*, in the Supreme Judicial Court for Suffolk County, No. 79-388 Civil. That case was removed to this court but was remanded for lack of removal jurisdiction because the plaintiff could not have originated the case in this court. (Memorandum and Order, C.A. 79-2059-S). *MBTA v. Adams* is an action to set aside an "award" of an arbitrator which consists of a legal ruling that c.405 is invalid and ineffective to alter the arbitration procedures contained in the collective bargaining agreement. *MBTA v. Adams* could be resolved in terms of the arbitrator's authority with consideration of the underlying federal questions. The second case is *Local 589, etc. et al. v. MBTA, Suffolk Superior Court*, C.A. No. 45919. That case has so far been concerned with the parties' rights under the extension period of the collective bargaining agreement in the light of c.581 of the Acts of 1980, although the complaint contains a reference to the contract clause of the Constitution, Art. I, section 10. The case has not been concerned with the effect of section 13(c) of UMTA or the 13(c) agreement.

[1, 2] Where the jurisdiction of the court has properly been invoked, this court is obliged to act in the absence of compelling reasons of comity and practicality. While state law does underlie the resolution of this case, as far as I can determine there are not any significant questions concerning state law at issue in the state cases, the resolution of which will aid in the decision of this case.[2] In these circumstances abstention is at best a discretionary matter. *Puerto Rico International Airlines, Inc. v.*

2. None of the parties disagree about the meaning of the state statutes involved; they disagree about the effect of those statutes on existing contracts and their interrelation with federal law.

Silva Recio, 520 F.2d 1342, 1345 (1st Cir. 1975). One of the issues to be considered in the exercise of discretion is the exigency of the issue to be decided. It is clear that significant arbitration necessary to resolve the current labor dispute affecting this critical transit system will not proceed until the federal questions are resolved. This does not strike me as the time for an elegant game of jurisdictional shuttlecock. *Cf. England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed. 440 (1964). Accordingly, I shall proceed with an attempt to resolve the federal questions.

IV. *THE COLLECTIVE-BARGAINING AGREEMENT*

Section 13(c) of UMTA and the agreement thereunder are essentially preservative rather than creative of contract rights, as is the contract clause of the Constitution. A useful first inquiry is to determine whether the collective bargaining agreements pre-date the 1974 13(c) agreement or post-date it; similarly, whether they pre-date c.405 or post-date it. All agree that they pre-date c.581 of the Acts of 1980.

The defendants contend that the Transit Union's current collective bargaining agreement is dated August 8, 1979, and the Memorandum of Understanding, dated August 8, 1979, merely incorporated by reference all of the unamended provisions of the Articles of Agreement of January 1, 1973.

They argue further that the notification of desire for change under Section 600 terminates the contract, since there is no other explicit provision for termination.

If the notification of a desire for change provides only for amendment, then it would superficially appear, as defendants say, that the contract rolls on in perpetuity. Massachusetts law, however, provides for termination of such contracts by operation of law, in some cases on appropriate notice. *Simons v. American Dry Ginger Ale Co., Inc.*, 335 Mass. 521, 524, 140 N.E.2d 649 (1957); *Phoenix Spring Beverage Co. v. Harvard Brewing Co.*, 312 Mass. 501, 506, 45 N.E.2d 473 (1942); *Marble v. Standard Oil Co.*, 169 Mass. 553, 561, 48 N.E. 783 (1897). I need not consider what would be necessary to terminate the agreement in this case, because neither party has made any attempt to do so.

The Memorandum of Understanding by its explicit terms provides:

> 1. That the Articles of Agreement entered into as of January 1, 1973, as amended, shall be further amended as follows:
>
> • • • • • •

Section 300 of the Articles provides that it shall continue in force "until and including the thirty-first day of December, 1975, and from year to year thereafter unless changed by the Parties hereto." Section 601 provides for arbitration in the event of a disagreement with respect to requested changes, "and the Award shall then be entered into and *become a part of this Agreement.* [Emphasis supplied.] I take the Memorandum of Understanding as an authentic interpretation and resolution by the parties of the inconsistent provisions of Sections 600 and 601.

I conclude from the foregoing that the Transit Union's current collective bargaining agreement is embodied in the Articles of Agreement dated January 1, 1973, as most recently amended August 8, 1979.

[3] The defendants contend further that the Machinists' Union has no current collective bargaining agreement at all, and has not had one since December 31, 1977. Their most recent contract is dated January 1, 1976 to continue until December 31, 1977 and from year to year thereafter unless notice of a desire to change or terminate the contract is served by one party on the other at least 60 days before the next anniversary. A notice to change was so served by both parties in October of 1977. By the terms of the contract, this notice operated to cut off the "year to year" extended term. In fact, however, as appears from the uncontradicted affidavit of Anthony Mastandrea, the parties have treated the agreement as continuing in force up to this time, and have mutually enforced its terms as

from time to time amended. I rule that the MBTA is estopped to deny the continuation in force of the agreement dated January 1, 1976, which is the Machinists' Union's current collective bargaining agreement with MBTA.

Accordingly, both collective bargaining agreements pre-date c.405 of the Acts of 1978.

V. *THE EFFECT OF c.405 OF THE ACTS OF 1978 ON CONTRACT PROVISIONS FOR ARBITRATION—THE CONSTITUTIONAL QUESTION*

[4] The next question concerns the power of the state to alter the existing contractual arrangements of its public corporations. It was early recognized that the contract clause imposes less of a restriction on a state's impairment of the rights of those who deal with public corporations than an impairment of the rights of other contracting parties. It was thought that the state had a compelling interest in the governance of such corporations which outweighed the sanctity of contracts. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 628, 4 L.Ed. 629 (1819). More recently, the state's rights have been perceived as subject to constitutional limitation, even when the contracting party is a public body. This limitation is illustrated by two relatively recent cases: *City of El Paso v. Simmons*, 379 U.S. 497, 85 S.Ct. 577, 13 L.Ed.2d 446 (1965), and *United States Trust Company of New York, Trustee v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977). In summary, a state may impair an obligation of a public body only with respect to some aspect of the contract which was not central to the reasonable expectations of the contracting parties, and then only if the impairment is reasonable and necessary in the furtherance of a valid state policy.

Plaintiffs point to an arbitration "award" now being contested in the Supreme Judicial Court of Massachusetts, in which the arbitrator ruled that c.405 was invalid. The cases cited by the plaintiff to establish collateral estoppel by this award all deal with grievance arbitration. I know of no case in which the judgment of an arbitrator (who may not be a lawyer) is held to bar resolution of a pure question of law by a court of competent jurisdiction.

[5] I rule that c.405 of the Acts of 1978 was effective to amend and add to the agreement of the parties relative to interest arbitration except with respect to the central mutual consideration of the agreement and the core of the parties' reasonable expectations. The detailed application of this principle to the agreement in question follows:

a. I rule that tripartite arbitration, as provided in the agreements, whereby each side chooses its own arbitrator and those arbitrators choose a neutral third, is a central consideration of the contracts and cannot be disturbed by subsequent legislation. So much of c.405 as imposes arbitration by a single arbitrator is invalid.

b. The qualifications of the neutral arbitrator are not stated in the agreements except that he is to be "experienced in transportation". This clearly is not intended to be exclusive. The additional qualifications imposed by c.405 that the neutral arbitrator be a legal resident of the commonwealth and experienced in state and local finance is not in conflict with nor an impairment of the contract, and is a reasonable and valid provision.

c. The agreements do not specify the standards which shall be applied by the arbitrators. Accordingly, there is no conflict or impairment in the provision of c.405 (appearing as M.G.L. c.161A § 19F) requiring the arbitrators to rely "primarily" on eight factors in determining an award. The factors are not exclusive, and, moreover, number 8 includes such factors "normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining [etc.] ... in the public service of the commonwealth."

d. The limitation on awarding a provision for cost-of-living adjustments after the period covered by the award is a limitation on the prior power of the arbitrators, but I find and rule the same to be within the power of a state to control the affairs of a public corporation.

There are, moreover, two provisions of c.405 which grant to the arbitrators power which they did not have before, to which apparently the plaintiffs do not object. The first is to inquire into the financial capacity of the Authority. The arbitrators are not limited to the specific considerations of tax burdens under this provision, but under the generality of the paragraph can presumably inquire as to other opportunities for savings or for the raising of fares. The second is that the award of the arbitrator may be enforced against the appropriate legislative or appropriating body.[3] M.G.L. c.161A § 19G. *Cf. City of Boston v. MBTA*, 373 Mass. 819, 370 N.E.2d 1359 (1977).

In summary, absent the provisions of section 13(c) of UMTA and the 13(c) agreement of 1974, binding interest arbitration must be conducted in accordance with c.405 of the Acts of 1978 *except* that three arbitrators shall be chosen as provided in the collective bargaining agreements and the third or neutral arbitrator shall be (1) experienced in transportation, (2) a legal resident of the Commonwealth of Massachusetts, and (3) experienced in state and local finances.

VI. *THE EFFECT OF c.581 OF THE ACTS OF 1980 ON THE CONTRACT PROVISIONS—THE CONSTITUTIONAL QUESTION*

The same legal criteria apply to this question as are set out at length in the foregoing section. There is no doubt in my mind that the obligation to continue to bargain collectively is a central consideration of the agreements in force when c.581 of the Acts of 1980 was passed. To the extent that c.581 withdraws questions of substance from collective bargaining it is in violation of Article 1, section 10 of the Constitution of the United States. Counsel for the Advisory Board suggests that I consider the practical consequences of my rulings, and I agree that I should where there are areas of discretion or open interpretation. Clear legal and constitutional mandates may not be avoided, however, even if they result in the practical disaster which he foresees. The MBTA's arguable lack of success in collective bargaining does not justify repudiation of its contractual agreements, which were fully authorized by the legislature. M.G.L. c.161A § 19.

VII. *THE EFFECT ON THE FOREGOING OF SECTION 13(c) OF UMTA AND THE 13(c) AGREEMENT ENTERED THEREUNDER*

As previously stated, under the Court of Appeals' decision in *Local Div. No. 714, etc. v. Greater Portland, etc.*, 589 F.2d 1 (1st Cir. 1978), enforcement of rights under section 13(c) means enforcement of the terms of the contract entered into in pursuance thereof. The parties agree that the provision of that contract which bears on this controversy is paragraph 4, the material part of which is as follows:

> 4. The collective bargaining rights of employees of the Authority represented by Labor Organizations signatory hereto[4] including the right to arbitrate labor disputes and to maintain union security and check-off arrangements, to the extent such are provided for by applicable laws and/or existing collective bargaining agreements, or otherwise shall be preserved and continued.

While such a provision might have broad application in a variety of situations, particularly where a public authority has used UMTA funds to acquire a private transit system, I shall confine my discussion to its effect in the present case. The first inquiry is to settle the meaning of "and/or" in the phrase "provided for by applicable laws

3. Presumably the Advisory Board and its constituent cities and towns.

4. The plaintiff and the intervenor unions were such signatories.

and/or existing collective bargaining agreements", since in this case there are both applicable laws and an existing collective bargaining agreement, at least with respect to the Transit Union. While the words and symbol "and/or" are anathema to the purist, "they are continued in use and Courts will have to deal with them according to the fa[illegible] appearing in any particular case." *McPherrin v. Hartford Fire Ins. Co.*, 44 F.Supp. 674, 676 (N.D.Cal., 1942). The practical construction of the phrase is to treat the phrase as if the alternatives were listed with either conjunction and followed by the phrase "or any combination thereof". 17 Am.Jur.2d, *Contracts*, § 283.

The contract speaks of "existing collective bargaining agreements" and "applicable law." The existing collective bargaining agreement for the Transit Union at the time of this contract were the Articles of Agreement of January 1, 1973. The [illegible] is silent as to the then-existing agreement of the Machinists' Union. The word "existing" is conspicuously not modifying applicable law. The continuation of the various employee benefits listed in the agreement is to continue, in my opinion, as provided in the collective bargaining agreement in force in 1974 subject to such laws as are "applicable" from time to time. Chapter 405 is applicable in part, as outlined above, but not applicable with respect to the termination of tripartite arbitration. Chapter 581 is not applicable, because it conflicts with the essential provisions of a prior agreement, and its applicability is interdicted by Article 1, Section 10, of the United States Constitution.

In short, the rights of the parties established by the interrelation of existing collective bargaining agreements, state statutes and the contract clause of the Constitution have been preserved but not altered by the 13(c) agreement. These rights remain as stated in Sections IV, V and VI of this memorandum. All that section 13(c) has accomplished in the context of this case is to provide a federal forum for the enforcement of these rights.

VIII. *ENJOINING THE LAYOFF—THE MACHINISTS' UNION*

[6] The collective bargaining agreement of the Machinists' Union dated January 1, 1976 remains in force. It contains a flat prohibition against layoffs in Article XIV:

> A. No Layoff—No employee, in any classification under the jurisdiction of the Association, shall be laid off during the term of this Agreement.

Despite the flat, unequivocal language of Article XIV, there remains a necessary residual, inherent right of the MBTA to layoff employees when it runs out of money. Its collective bargaining contract does empower it to demand funds in excess of its budget (unless it is necessary to fund an award made under c.405 of the Acts of 1978, M.G.L. c.161A § 19G). The propriety of such layoffs is clearly a controversy subject to binding arbitration under the terms of Article XLI of the collective bargaining agreement. This is not "interest arbitration" and consequently is not subject to the c.405 of the Acts of 1978 in any respect.

IX. *ENJOINING THE LAYOFF—THE TRANSIT UNION*

[7] The "no layoff" provision, Section 124 of the Transit Union's agreement, as amended August 8, 1979, contains the following provisions:

> Notwithstanding the provisions of Section 106 hereof, no employee in any classification under the jurisdiction of the Union will be laid off up to and including December 31, 1980 .... [provisions about temporary employees].
>
> For non-miscellaneous employees hired after the date of this Agreement, the No Layoff provision shall not apply during the first thirty (30) months of service.

The members of the Transit Union are in a more perilous situation than the members of the Machinists' Union. Section 124, as amended, provides no job security whatsoever for "non-miscellaneous" (*i. e.*, classified) employees hired after August 8, 1979 during their first 30 months of service. Thirty months have not yet elapsed. These employees constitute a large proportion of

those scheduled for layoff on March 21, 1981. They had no contract right to job security, and in view of their contract, no reasonable expectation of job security until 30 months elapsed. Even given the broadest theory of the discretionary power of the court to preserve the status quo, I do not see how a court would have any basis for enjoining the layoff of these employees.[5]

As to the employees hired prior to August 8, 1978, their job security expired on December 31, 1980. Plaintiffs suggest that some generalized obligation of fairness under section 13(c) of UMTA prevents the MBTA from utilizing the breakdown of collective bargaining and the resulting extended hiatus in employment security to accomplish the proposed layoffs. The contract provision was negotiated between the parties, and I perceive no legal or equitable basis for relieving the Union of a tough bargain any more than I see a basis for relieving the MBTA of a number of tough contract provisions upon which the Unions insist.

There is precedent in labor law, however, for maintaining the status quo during arbitration, including interest arbitration. *Local Division 519, Amalgamated Transit Union v. Lacrosse*, 445 F.Supp. 798 (W.D. Wisc.1977), *aff'd*, 585 F.2d 1340, 1350–51 (7th Cir. 1978); *Teamsters Local Union 71 v. Akers Motor Lines, Inc.*, 582 F.2d 1336, 1342 (4th Cir. 1978), *cert. denied*, 440 U.S. 929, 99 S.Ct. 1266, 59 L.Ed.2d 485 (1979); *Division 1447, Amalgamated Transit Union v. Louisville and Jefferson County Transit Authority*, No. C 79–0629 L(A) (W.D.Ky. 1980); *Division 1309, Amalgamated Transit Union v. San Diego Transit Corp.*, Civ. No. 78–1093–E (S.D.Cal.1979). If there were arbitration underway, and there were some likelihood that a resolution of the controversy would occur with reasonable dispatch, the public interest might well be best served by a preliminary injunction. The layoffs and the resulting curtailment of services have been ordered unilaterally by the MBTA with minimal opportunity for consideration of other ways of reducing MBTA expenses to comply with the Advisory Board's budget.

If I were advised before March 21, 1981 that arbitration between the MBTA and the Transit Union had commenced in accordance with this memorandum, I would consider enjoining the layoff of employe hired prior to August 8, 1979, but not otherwise. Accordingly, no injunction will issue at this time.

X. *SUMMARY*

In accordance with the foregoing, I am of the opinion that the plaintiffs are likely to succeed on the merits in establishing the following:

a. The MBTA and the Transit Union are obliged forthwith to institute interest arbitration by three arbitrators chosen in accordance with the Articles of Agreement dated January 1, 1973, but otherwise subject to the qualifications and considerations contained in c.405 of the Acts of 1978.

b. Chapter 581 of the Acts of 1980 is invalid to restrict the scope of collective bargaining contained in the unions' existing collective bargaining agreement, because said chapter constituted an impairment of contract in violation of Article 1, Section 10, of the Constitution of the United States.

c. The proposed layoffs of members of the Machinists' Union is in direct violation of the explicit terms of the collective bargaining agreement, and while they may be justified they are properly the subject of arbitration under the existing agreement before they are effectuated. Such arbitration would not be interest arbitration subject to c.405 of the Acts of 1978.

The plaintiffs are not in my opinion likely to succeed on the merits in establishing any basis for enjoining the proposed layoff of Transit Union employees, except that they

5. A possible exception would be a deliberate discriminatory animus in the selection of these employees aimed at causing the brunt of layoffs to fall on recently hired racial minorities. There is nothing in the record so far which would support any such conclusion.

might likely succeed with respect to employees hired prior to August 8, 1979 in establishing a basis for an injunction for a reasonable time pending arbitration, as described in paragraph 1 above, providing that such arbitration is set in motion prior to March 21, 1981.

In addition to the likelihood of success on the merits, I am obliged to consider the likelihood of irreparable harm to the plaintiffs if injunctive relief is not granted. Such irreparable harm must be weighed against the harm to the defendants resulting from the issuance of a preliminary injunction. In a case involving a public facility, the public interest must be considered.[6] *Levesque v. Maine*, 587 F.2d 78, 80 (1st Cir. 1978).

Weighing these factors, I am satisfied that a continued hiatus in the collective bargaining and arbitration process puts the continuing operation in such jeopardy as to create a serious likelihood of irreparable harm to the plaintiffs and, more critically, to the public. The discharge of members of the Machinists' Union in violation of their contract, without the opportunity for arbitration, presents a likelihood of irreparable harm to the employees and to the public because of the resulting deterioration of service.

Accordingly, preliminary injunctions will issue:

(1) Ordering the MBTA and the Transit Union to proceed forthwith to interest arbitration in accordance with the foregoing memorandum;

(2) Ordering the MBTA and the Machinists' Union to proceed forthwith to arbitration concerning the proposed layoff of 53 members and enjoining such layoff for a reasonable time pending the prompt completion of arbitration.

Pertinent statutes and contracts not quoted are set out in the appendix hereto.

APPENDIX

161A § 19 **CORPORATIONS**

§ 19. Employees; collective bargaining; arbitration; applicable provisions

The directors shall have authority to bargain collectively with labor organizations representing employees of the authority and to enter into agreements, with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of such employees; provided, however, that the directors shall have no authority to bargain collectively and shall have no authority to enter into collective bargaining agreements with respect to matters of inherent management right which shall include the right:

(*i*) to direct, appoint, employ, assign and promote officers, agents and employees and to determine the standards therefor.

(*ii*) (A) to discharge and terminate employees subject to the provisions of such clauses (B) and (C).

(B) No action set forth in (A) shall be sustained if, in a proceeding invoked in accordance with the provisions of such clause (C), the employee shall establish by a preponderance of the evidence that it was based upon race, color, religion, sex, age, national origin, handicapping condition, marital status, or political affiliation or activities or union activities or union organizing of the employees; a reprisal against the employee for disclosure of information by an employee which the employee reasonably believes evidences a violation of any law, rule or regulation or mismanagement, a gross waste of funds, or abuse of authority; a reprisal against any employee for the refusal of any person to engage in political activity.

(C) The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration which may be invoked in the event any employee of the authority is aggrieved by any action taken under such clause (A).

6. It should be emphasized that the judgments arrived at in this case do not in any way reflect the court's judgment as to the best way to resolve the problems of the MBTA and its employees. As I indicated at the hearing, in my view, the insistence by the parties on their legal rights may ultimately lead to the demise or receivership of the system. My task, however, is to identify what these rights are and enforce them as requested in accordance with settled principles of law.

APPENDIX—Continued

(iii) to plan and determine the levels of service provided by the authority.

(iv) to direct, supervise, control, and evaluate the departments, units, and programs of the authority; to classify the various positions of the authority and ascribe duties and standards of productivity therefor.

(v) to develop and determine levels of staffing and training.

(vi) to determine whether goods or services should be made, leased, contracted for, or purchased on either a temporary or permanent basis.

(vii) to assign and apportion overtime.

(viii) to hire part-time employees.

The authority is hereby prohibited from bargaining collectively or entering into any agreement to make pension benefit payments to its employees that are determined in a manner that includes the amount of overtime earnings of said employees.

The authority is hereby prohibited from bargaining collectively or entering into a contract which provides for automatic cost-of-living salary adjustments which are based on changes in the Consumer Price Index or other similar adjustments unless specifically authorized by law. Except as provided in sections nineteen C to nineteen G, inclusive, the employees of the authority shall submit all grievances and disputes pursuant to arbitration provisions in agreement existing at the time of the creation of the authority or subsequently entered into with the authority or, in the absence of such provisions, to the state board of conciliation and arbitration, or other board or body having similar powers and duties. The provisions of general or special laws relative to rates of wages, hours of employment and working conditions of public employees, shall not apply to the authority nor to the employees thereof, but the authority and its employees shall be governed with respect to hours of employment, rates of wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of its employees by the laws relating to street railway companies.

Amended by St.1977, c. 970, § 2; St.1978, c. 405, § 1; St.1980, c. 581, § 10.

161A § 19A BAY TRANSPORTATION AUTHORITY

§ 19A. State labor relations law; applicability

Notwithstanding any provisions of law to the contrary, the provisions of section five of chapter one hundred and fifty A shall so far as apt apply to the authority and its employees, excepting directors, executives and those confidential employees representing the authority and dealing with employee organizations. Nothing in this section shall be construed as conferring upon the employees of the authority the right to strike, nor as detracting from the obligations of the authority and the employees to submit all grievances and other disputes to arbitration.

Added by St.1970, c. 514.

Historical Note

St.1970, c. 514, an emergency act, was approved July 8, 1970.

§ 19B. Deceased employees; payment of wages or vacation allowances to nominated beneficiary, surviving spouse or next of kin

Whenever any employee or former employee of the authority dies, and the authority owes his estate any sum or sums by reason of services rendered by him for wages or vacation allowances, and neither a duly appointed executor or administrator nor a voluntary administrator has made written demand for payment upon the treasurer of the authority and such treasurer shall not otherwise have actual

notice that proceedings relative to the formal or informal settlement of such estate have been commenced in any probate court, such sum or sums may, in the discretion of the authority, be paid after the expiration of thirty days from the death of such employee to such person as may have been nominated as beneficiary, on a form approved by the directors and filed with the treasurer by such employee during his lifetime or, if there is no such beneficiary, then to the surviving spouse or next of kin of such employee. Payments made as provided in this section shall discharge all liability of the authority to all persons with respect to such sum or sums.

Added by St.1973, c. 857.

Historical Note

St.1973, c. 857, was approved Oct. 2, 1973. Emergency declaration by the Governor was filed Oct. 3, 1973.

Library References

States ⇐64.1(3). C.J.S. States § 94.

§ 19C. Collective bargaining; submission to arbitration

Notwithstanding the provisions of sections nineteen and ninteeen A, the authority or any organizations representing employees of the authority shall not be permitted to submit any dispute over the terms of a collective bargaining agreement to arbitration except in accordance with sections nineteen C through nineteen G, inclusive; provided, however, that this section shall not limit the rights of organizations representing employees of the authority to submit grievances to arbitration in accordance with the collective bargaining agreement between the parties. Added by St.1978, c. 405, § 2.

1978 Enactment. St.1978, c. 405, § 2, was approved July 13, 1978, and by section 5 made effective upon its passage.

Sections 3 and 4 as amended by St.1979, c. 298, § 1, approved June 19, 1979 and by section 2 made effective July 13, 1978 provided:

"Section 3. Notwithstanding the provisions of any general or special law to the contrary, there shall be no salary adjustment awarded to any management employees of the authority for a period of eighteen months from the date of such employee's last salary adjustment; provided, however, that the provisions of this section shall not apply to any cost-of-living adjustment for management employees who are covered in a collective bargaining agreement."

"Section 4. The provisions of this act are severable, and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions."

Library References

Labor Relations ⇐414.
C.J.S. Labor Relations § 405 et seq.

§ 19D. Mediation; selection of mediator; report; selection of arbitrator

In the event the directors and any organizations representing employees of the authority have not reached an agreement within ninety days from the date of the expiration of the agreement, either party may notify the other that it desires mediation. The parties may agree upon a person to serve as a mediator or, if unable to agree on said mediator, either party or the parties acting jointly may petition the board of conciliation and arbitration to appoint a mediator from a list of qualified persons maintained by the board.

After a reasonable period of mediation, not to exceed forty-five days from the date of appointment, said mediator shall issue a report indicating the results of his services in resolving the impasse. If at the conclusion of mediation, the mediator certifies that the impasse still exists, either party may notify the other that it desires arbitration of the matters in dispute. Within ten days of said notice, the parties shall meet to select a single neutral arbitrator. If, within fifteen days, the parties fail to select such single arbitrator, either party may forthwith petition the board of conciliation and arbitration to request a list of five arbitrators from

APPENDIX—Continued

the American Arbitration Association and said Association shall certify to the board that such arbitrators on the list it provides possess the qualifications as provided in section nineteen E. The parties shall thereupon meet to select such arbitrator by striking one name each until one name remains and that person shall serve as the neutral arbitrator. If after ten days, if one of the parties declines to strike their names, the other party shall strike two names and the board shall forthwith select the arbitrator from the remaining three names.

Added by St.1978, c. 405, § 2.

1978 Enactment. St.1978, c. 405, § 2, was approved July 13, 1978.

Library References
Labor Relations ⇐414, 453.
C.J.S. Labor Relations §§ 405 et seq., 464, 465.

§ 19E. Qualifications of arbitrator

The single arbitrator, whether agreed upon by the parties or selected by the board of conciliation and arbitration, shall be a legal resident of the commonwealth and shall be experienced in state and local finance.

Added by St.1978, c. 405, § 2.

1978 Enactment. St.1978, c. 405, § 2, was approved July 13, 1978.

Library References
Labor Relations ⇐453.
C.J.S. Labor Relations §§ 464, 465.

§ 19F. Factors in determining the basis for award

The arbitrator shall rely primarily on the following factors in determining the basis for an award:

1. The financial ability of the authority to meet additional costs, which shall include but not be limited to:

a. the statutory requirement of advisory board approval of the authority's fiscal budget;

b. the financial ability of the individual communities and the commonwealth to meet additional costs;

c. the average per capita tax burden, average annual income and sources of revenue within the commonwealth, and the effect of any arbitration award on the respective property tax rates of the cities and towns within the authority's district.

2. The overall compensation presently received by the employees, having regard not only for wages for time actually worked but also for wages for time not worked, including vacations, holidays and other excused time.

3. All benefits received by the employees, including insurance, pension, as well as the continuity and stability of employment.

4. The hazards of employment, physical, educational and mental qualifications, job training and skills involved.

5. A comparison of wages, hours, and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services within the commonwealth and with other employees generally in public and private employment within the commonwealth.

6. The average consumer price for goods and services, commonly known as the cost of living.

7. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

8. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between parties, in the public service of the commonwealth, and which are not precluded from bargaining under section nineteen.

9. The stipulation of the parties.

Added by St.1978, c. 405, § 2. Amended by St.1980, c. 581, § 9.

1978 Enactment. St.1978, c. 405, § 2, was approved July 13, 1978.

1980 Amendment. St.1980, c. 581, § 9, in par. 8, added ", and which are not precluded from bargaining under section nineteen".

Section 25 of St.1980, c. 581, provided: "The provisions of this act are severable, and if any of its provisions or an application thereof shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions or other applications thereof."

St.1980, c. 581 was approved Dec. 7, 1980. Emergency declaration by the governor was filed Dec. 8, 1980.

Library References
Labor Relations ⇐457.
C.J.S. Labor Relations § 473.

APPENDIX—Continued

§ 19G. Written opinion of arbitrator; binding nature; scope of arbitration; cost of mediation and arbitration

Within thirty calendar days of an award, the arbitrator shall issue a written opinion inclusive of an analysis of all statutory factors applicable to the proceedings. Any determination by the arbitrator, if supported by material and substantial evidence on the record, shall be binding upon the parties and upon the appropriate legislative or appropriating body and may be enforced at the insistence of either party or by the arbitrator in the superior court. The scope of arbitration shall be limited to wages, hours, and conditions of employment and shall not include any provisions for any cost of living adjustments which are based on changes in the Consumer Price Index after the expiration of the contract period covered by the award. In addition, any wage or salary adjustments shall be expressed in per cent or dollar amounts, and in no case shall there be any provision for salary adjustments to occur after the expiration of the contract period covered by the award.

The cost, if any, of the mediation and of arbitration proceedings exclusive of the expenses of the individual parties provided for under sections nineteen C through nineteen G shall be divided equally by the parties and shall be in accordance with a schedule of payments established by the American Arbitration Association.
Added by St.1978, c. 405, § 2.

ACTS, 1980. – Chap. 581.

THE COMMONWEALTH OF MASSACHUSETTS

Advance Copy 1980 Acts and Resolves

MICHAEL JOSEPH CONNOLLY, State Secretary

Chap. 581. AN ACT RELATIVE TO THE STRUCTURE OF THE MASSACHUSETTS BAY TRANSPORTATION AUTHORITY.

Be it enacted, etc., as follows:

SECTION 1. Section ninety-one A of chapter one hundred and sixty-one of the General Laws is hereby repealed.

SECTION 2. Section 3 of chapter 161A of the General Laws is hereby amended by striking out paragraph (*d*), as most recently amended by section 6 of chapter 1140 of the acts of 1973, and inserting in place thereof the following paragraph:-

(*d*) To appoint and employ officers, including a general manager, agents, and employees to serve at the pleasure of the directors, except as may otherwise be provided in collective bargaining agreements, and to fix their compensation and conditions of employment; provided, however, the authority may bind itself by contract to employ not more than five senior officers but no such contract shall be for a period of more than five years. The advisory board shall approve the appointment of a general manager.

The authority shall annually, on or before January first, submit a schedule of salaries of all its employees and any proposed increases therein to the secretary of administration for his review. Said secretary may make recommendations to the authority on said salary structure and shall advise the authority of the prevailing rates that the commonwealth pays for similar services.

SECTION 3. Said chapter 161A is hereby further amended by striking out section 6, as most recently amended by section 10 of said chapter 1140, and inserting in place thereof the following section:-

Section 6. The authority shall be managed by a board of seven directors, hereinafter in this chapter called the directors, one of whom shall be the secretary, who shall be the chairman and shall not be compensated therefor, six of whom shall be appointed by the governor and who shall serve coterminus with the governor, one with the approval of the advisory board, one with the approval of the fourteen cities and towns, and one with the approval of the sixty-four cities and towns. The approval of the fourteen cities and towns shall be determined by a majority vote of their mayors, or city managers in the cases of Plan D or Plan E cities, and chairmen of the boards of selectmen and town managers in towns having a town council form of government with the vote of each city and town counted as on said advisory board; provided that fifty per cent or more of the total votes as set forth in said section seven is represented at such meeting. The approval of the advisory board and of the sixty-four cities and towns shall be determined by a majority vote of their mayors or city managers and chairmen of selectmen or town managers present and voting thereon with the vote of each city and town counted as on said advisory board; provided that fifty per cent or more of the total votes as set forth in said section seven is represented at such meeting. One of the appointees of the governor shall be experienced in transportation, one a member of organized labor who shall be a member of a national or international labor organization, and one experienced in administration and finance. No more than four of the seven directors shall be members of the same political party. Two of the appointees of the governor shall not be residents of the area constituting the authority.

Any director except the chairman may be removed for cause by the governor and any vacancy in the office of a director shall be filled, by appointment of the governor with the approval applicable to such under the provisions of section three of chapter twelve shall not apply to said board of directors. The six directors appointed by the governor shall receive a salary of seven thousand five hundred dollars. A majority of the directors shall constitute a quorum, but a majority vote of the entire membership of the board of directors shall be required to take any particular action.

SECTION 4. Said chapter 161A is hereby further amended by inserting after section 7 the following section:-

Section 7A. A designee of the governor shall be a member of the advisory board, and shall have the same number of votes on said board as the city or town with the greatest number of votes on said board; provided, however, that the designee shall not be considered a voting member on the approval of any appointment to the board of directors, or the position of general manager; provided, further, that in any case where the designee of the governor, and said city or town with the greatest number of votes shall vote the same, their combined vote shall equal the vote of said city or town; and provided, further, that an affirmative vote of at least one-third of the cities and towns present and voting shall be required for approval of any action or appointment.

The number of votes of such designee shall be in addition to the total number of votes of each city and town as determined by the authority, based upon the most recent annual assessment.

SECTION 5. Said chapter 161A is hereby further amended by inserting after section 11 the following section:-

Section 11A. Any of the sixty-four cities and towns may for the purpose of providing local bus service enter into agreements with any person lawfully authorized to operate any motor bus on any public way therein for the carrying of passengers for hire.

Said city or town shall have the same powers and duties in respect to such private bus carriers as are provided by law for the department of public utilities, except as to safety of equipment and operations, schedules, and routes not being, however, considered safety of equipment and operations for purposes of this paragraph; and provided that the authority shall be notified of the

establishment of any such contract local service, but shall not have control or jurisdiction over said service.

SECTION 6. The third paragraph of section 12 of said chapter 1964, is hereby amended by adding the following sentence: —The authority shall consult with the finance advisory board established by section ninety-seven of chapter six prior to the sale of any such notes as to the timing and terms thereof.

SECTION 7. Subsection (*a*) of section 12A of said chapter 161A, as appearing in section 15 of chapter 4 of the acts of 1976, is hereby amended by adding the following sentence:—The authority shall consult with the finance advisory board established by section ninety-seven of chapter six prior to the sale of any such notes as to the timing and terms thereof.

SECTION 8. Section 19 of said chapter 161A is hereby amended by striking out the first sentence, as appearing in section 18 of chapter 563 of the acts of 1964, and inserting in place thereof the following sentences: —The directors shall have authority to bargain collectively with labor organizations representing employees of the authority and to enter into agreements, with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of such employees; provided, however, that the directors shall have no authority to bargain collectively and shall have no authority to enter into collective bargaining agreements with respect to matters of inherent management right which shall include the right:

(*i*) to direct, appoint, employ, assign and promote officers, agents and employees and to determine the standards therefor.

(*ii*)(A) to discharge and terminate employees subject to the provisions of such clauses (B) and (C).

(B) No action set forth in (A) shall be sustained if, in a proceeding invoked in accordance with the provisions of such clause (C), the employee shall establish by a preponderance of the evidence that it was based upon race, color, religion, sex, age, national origin, handicapping condition, marital status, or political affiliation or activities or union activities or union organizing of the employees; a reprisal against the employee for disclosure of information by an employee which the employee reasonably believes evidences a violation of any law, rule or regulation or mismanagement, a gross waste of funds, or abuse of authority; a reprisal against any employee for the refusal of any person to engage in political activity.

(C) The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration which may be invoked in the event any employee of the authority is aggrieved by any action taken under such clause (A).

(*iii*) to plan and determine the levels of service provided by the authority.

(*iv*) to direct, supervise, control, and evaluate the departments, units, and programs of the authority; to classify the various positions of the authority and ascribe duties and standards of productivity therefor.

(*v*) to develop and determine levels of staffing and training.

(*vi*) to determine whether goods or services should be made, leased, contracted for, or purchased on either a temporary or permanent basis.

(*vii*) to assign and apportion overtime.

(*viii*) to hire part-time employees.

The authority is hereby prohibited from bargaining collectively or entering into any agreement to make pension benefit payments to its employees that are determined in a manner that includes the amount of overtime earnings of said employees.

The authority is hereby prohibited from bargaining collectively or entering into a contract which provides for automatic cost-of-living salary adjustments which are based on changes in the Consumer Price Index or other similar adjustments unless specifically authorized by law.

SECTION 9. Section 19F of said chapter 161A, as appearing in section 2 of chapter 405 of the acts of 1978, is hereby amended

by striking out paragraph 8 and inserting in place thereof the following paragraph:—

8. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between parties, in the public service of the commonwealth, and which are not precluded from bargaining under section nineteen.

SECTION 10. The second paragraph of section 23 of said chapter 161A, as appearing in section 18 of chapter 563 of the acts of 1964, is hereby amended by adding the following sentence:—No bonds of the authority shall be sold by the authority unless prior to such sale the authority shall have consulted with the finance advisory board established by section ninety-seven of chapter six as to the timing and terms thereof.

SECTION 11. The fourth paragraph of said section 23 of said chapter 161A, as amended by section 3 of chapter 650 of the acts of 1965, is hereby further amended by striking out the last sentence and inserting in place thereof the following sentence:—Subject to the requirement of consultation with the finance advisory board established by section ninety-seven of chapter six, the authority may sell such bonds in such manner, either at public or private sale, and for such price as it may determine to be for the best interests of the authority.

SECTION 12. Said chapter 161A is hereby further amended by striking out section 29, as appearing in section 18 of chapter 563 of the acts of 1964, and inserting in place thereof the following section:—

Section 29. The authority is authorized and directed from time to time to take all necessary action to secure any federal assistance which is or may become available to the commonwealth or any of its political subdivisions, for any of the purposes of this chapter. If any federal law, administrative regulations or practice requires any action relating to such federal assistance to be taken by any department or instrumentality of the commonwealth other than the authority, such other department or instrumentality is authorized and directed to take all such action, including without limitation filing applications for assistance, supervising the expenditure of federal grants or loans to the foregoing, and the authority is hereby authorized and directed to take all actions which are not inconsistent with state law and which are necessary to permit such other department or instrumentality to comply with federal requirements. If the provisions of any federal law, administrative regulation, or practice governing federal assistance for the purposes of this chapter are inconsistent with any provisions of this chapter to the extent that the commonwealth or its political subdivisions are prohibited or potentially prohibited from receiving such assistance, the chairman of the authority shall, within thirty days after the federal government has notified him that an inconsistency may exist, notify the governor, and the clerks of the house and senate of such inconsistency.

SECTION 13. Chapter 151 of the acts of 1979 is hereby amended by striking out section 8A and inserting in place thereof the following two sections:—

Section 8A. The budget of the Massachusetts Bay Transportation Authority shall not be greater than one hundred and four per cent of the budget approved for said authority for the preceding fiscal year, provided, however, that said budget may be increased by those amounts approved in accordance with section eight B.

Section 8B. The Massachusetts Bay Transportation Authority may increase the budget limit imposed by section eight A by the approval of a specified amount by a two-thirds vote of the members of the advisory board present and voting.

SECTION 14. Section 16 of said chapter 151 is amended by adding the following at the end thereof:-

; provided, however, that sections eight A and eight B shall not expire until December thirty-first, nineteen hundred and eighty-three, and the provisions of section two, and sections 15A through 15E inclu-

sive, insofar as applicable to the provisions of section eight A, shall not expire until December thirty-first, nineteen hundred and eighty-three.

SECTION 15. The directors of the authority, and each of the bargaining units within the authority, are hereby directed to establish for each said bargaining unit a productivity and conduct committee to be composed of three members of management chosen by the directors and three members of the respective bargaining unit, to be chosen by the officers thereof.

Said committees shall recommend the establishment of standards of productivity, and conduct of employees for each respective bargaining unit no later than June thirtieth, nineteen hundred and eighty-one.

The directors shall review, revise and implement said standards no later than thirty days after receiving such recommendations, and shall file a report with the clerk of the house of representatives on each set of standards as they are implemented.

SECTION 16. The authority is hereby authorized and directed to develop, implement and utilize an equipment maintenance information recording system for the authority. The authority shall establish a joint labor-management committee for the purpose of providing consultation and cooperation in the development of said equipment maintenance information recording system. Said systems reporting requirements shall include, but not be limited to, vehicle numbers, defects reported, defects found, cause determination, action taken, by whom, and duration of repair. Said system is to be developed, approved by the authority's board of directors, implemented in the automotive equipment maintenance department, and a report outlining said system filed in the office of the house clerk no later than the first Wednesday of January, nineteen hundred and eighty-two.

The clerk shall forward said report to the joint committees on transportation and post audit and oversight, and the report shall be reviewed by a subcommittee of the post audit and oversight committee, which shall be appointed by the chairman thereof.

Said subcommittee, in consultation with the transportation committee may make such recommendations as they deem necessary to the authority with regard to said information system.

Said systems will be initially implemented in the automotive department and upon acceptance by the authority initiated in all other equipment maintenance departments as it applies to said departments.

SECTION 17. Commencing with the commonwealth's fiscal year nineteen hundred and eighty-four, beginning on July first, nineteen hundred and eighty-three, the Massachusetts Bay Transportation Authority shall operate on a fiscal year cycle coinciding with that of the commonwealth.

The board of directors of said authority shall prepare a plan to implement said fiscal year change and shall submit for approval said plan to the secretary of administration and finance not later than the first Wednesday of December, nineteen hundred and eighty-one.

Notwithstanding any general or special law to the contrary, commencing with the commonwealth's fiscal year nineteen hundred and eighty-four, all expenses of the authority shall be in accordance with an itemized budget. The authority, in consultation with the secretary of transportation and the advisory board, shall prepare and shall submit such budget for the ensuing fiscal year to the secretary and the advisory board not later than the date set by the commissioner of administration pursuant to section three of chapter twenty-nine of the General Laws for the submission of statements to the budget director.

The secretary shall review and make recommendations regarding such budget within thirty days after submission.

Within forty-five days after submission, the advisory board shall approve said budget as submitted or subject it to such itemized reductions therein as the advisory board shall deem appropriate. Such itemized reductions shall be accompanied by a clear delineation of the areas of services to

be reduced and the degree of reduction of service including a statement by location, line, and mode of the level of maintainable service resulting from such itemized reduction. The advisory board shall vote on each item within the authority's budget and may subject the authority's proposed budget to itemized reductions as the advisory board may deem appropriate. The board of directors shall, no later than the first Wednesday in December file a copy of such budget with the governor. Said budget shall include all requests and recommendations of the authority for capital outlay programs and projects for the ensuing year.

Within three weeks after the convening of the general court the governor shall file a copy of the budget with the clerk of the house of representatives and the clerk of the senate. Said budget shall include all requests and recommendations of the authority for capital outlay programs and projects for the ensuing year.

The governor shall include as a line item within the budget submitted pursuant to Section 2 of Article LXIII of the Amendments to the Constitution his recommendation for the share of the net cost of service at the Massachusetts Bay Transportation Authority to be paid by the commonwealth.

SECTION 18. Notwithstanding the provisions of subsection (*i*) of section five of chapter one hundred and sixty-one A of the General Laws, chapter one hundred and fifty-one of the acts of nineteen hundred and seventy-nine, section twenty-seven C of chapter twenty-nine of the General Laws and of section twenty A of chapter fifty-nine of the General Laws, the board of directors of the Massachusetts Bay Transportation Authority may by an affirmative vote of the directors, approve and restore to the budget for the calendar year nineteen hundred and eighty any or all itemized reductions which the advisory board may make or may have made in any budget or supplementary budget submitted to it; provided, however, that the amounts so approved and so restored to any such budgets shall not cause it to exceed the total sum of three hundred and forty-three million one hundred and sixty-six thousand eight hundred and forty-six dollars; and provided, further, that no amount in excess of three hundred and forty-three million dollars shall be spent unless the authority conducts its labor negotiations in accordance with chapter four hundred and five of the acts of nineteen hundred and seventy-eight. Said budget shall cover all expenditures incurred by the Massachusetts Bay Transportation Authority board of directors during calendar year nineteen hundred and eighty, including without limitation those costs incurred pursuant to Executive Order No. 189, issued on November eighteenth, nineteen hundred and eighty. The Local Aid Fund shall not be reduced by the amount of any funds restored pursuant to this section.

SECTION 19. In addition to the contract assistance authorized to be provided in section twenty-eight of chapter one hundred and sixty-one A of the General Laws, the commonwealth, acting by and through the executive office of administration and finance, may enter into an additional contract with the Massachusetts Bay Transportation Authority for contract assistance of a portion of the net cost of the calendar 1980 budget approved by the Advisory Board. In addition, for said year, the commonwealth shall provide assistance equal to the seventy-five per cent of the net cost of service in excess of three hundred and two million, one hundred and thirty thousand, three hundred and seventy-seven dollars authorized by the advisory board for operation of the authority for such year.

SECTION 20. One-third of said additional net cost of service assumed by the commonwealth pursuant to section fourteen C shall be included in any determination of total costs, charges, or fees, under the provisions of section twenty A of chapter fifty-nine of the General Laws, for the cities and towns within the jurisdiction of the authority.

SECTION 21. Section twenty A of chapter fifty-nine of the General Laws, as inserted by section twelve of chapter five hundred and eighty of the acts of nineteen hundred and eighty, shall apply to costs

assessed upon member cities and towns of the Massachusetts Bay Transportation Authority, for the operation thereof, beginning calendar year nineteen hundred and eighty-one.

SECTION 22. The board of directors serving on the effective date of this act shall continue to serve until their successors are duly appointed.

SECTION 23. All positions vacant or which become vacant, on or after the effective date of this act, shall remain vacant; provided, that vacancies for which there exists a critical need may be filled upon certification of said critical need by the secretary of administration and finance; and provided, further, that said secretary shall report quarterly to the house and senate committees on ways and means the number, salary, title and job descriptions of all persons hired under the provisions of this section. No employee shall be terminated as part of any reduction in force, which result from enactment of this act, except in accordance with the provisions of the collective bargaining agreement in effect on the date of such termination.

SECTION 24. Section four of this act shall become inoperative on July first, nineteen hundred and eighty-three.

SECTION 25. The provisions of this act are severable, and if any of its provisions or an application thereof shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions or other applications thereof.

Approved December 7, 1980.

EMERGENCY LETTER

December 8, 1980 @ 12:46 PM

§ 1609. Labor standards

Action of Secretary

(a) The Secretary shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed with the assistance of loans or grants under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended. The Secretary shall not approve any such loan or grant without first obtaining adequate assurance that required labor standards will be maintained upon the construction work.

Authority of Secretary of Labor

(b) The Secretary of Labor shall have, with respect to the labor standards specified in subsection (a) of this section, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267), and section 276c of Title 40.

Interests of employees; protective arrangements; terms and conditions

(c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

Pub.L. 88-365, § 13, formerly § 10, July 9, 1964, 78 Stat. 307, renumbered and amended Pub.L. 89-562, § 2(a)(1), (b)(2), Sept. 8,

1966, 80 Stat. 715, 716; Pub.L. 90-19, § 20(a), May 25, 1967, 81 Stat. 25.

AGREEMENT PURSUANT TO SECTION 13(c) OF THE URBAN MASS TRANSPORTATION ACT OF 1964, AS AMENDED.

This agreement is made and entered into by and between the Massachusetts Bay Transportation Authority ("Authority"), party of the first part, and the labor organizations signatory hereto ("Unions"), party of the second part.

WHEREAS, the Authority has filed applications under the Urban Mass Transportation Act of 1964, as amended ("Act"), for a capital grant to finance (1) Plant and Facilities Improvements; (2) Acquisition and Installation of Plant Machinery and Equipment; (3) Acquisition of Non-Revenue Equipment and Rolling Stock; (4) Power and Signal System Improvements; (5) Acquisition and Installation of Bus Radios, entitled "Plant Improvements—Phase III", as more fully described in the project application dated December 21, 1973; (6) Bus Storage and Maintenance Facilities at Charlestown, as more fully described in the project application dated April 19, 1974; (7) Purchase of 203 New Buses; (8) Purchase of 276 New Buses, as more fully described in project applications dated April 17, 1974; and (9) Restoration of Track Support Structures, as more fully described in project application dated August 7, 1974; and Immediate Needs—Power Generation Improvements, as more fully described in project application dated October 28, 1974—("Project"); and

WHEREAS, section 13(c) of the Act requires, as a condition of any assistance thereunder, that fair and equitable arrangements be made, as determined by the Secretary of Labor, "to protect the interests of employees affected by such assistance"; and

WHEREAS, the Unions signatory hereto represent certain employees of the Authority and certain other private carrier employers in the area presently served by the Authority; and

WHEREAS, the scope and purpose of this agreement is to provide fair and equitable arrangements pursuant to Section 13(c) of the Act to protect the interests of employees affected by such assistance to the Project; and

WHEREAS, the following arrangements have been agreed upon by the parties hereto as fair and equitable;

NOW, THEREFORE, IT IS AGREED that in the event the Project is approved for assistance under the Act the following terms and conditions shall apply:

1. The phrase "as a result of the Project" shall, when used in this Agreement, include events occurring in anticipation of, during, and subsequent to the Project; provided, however, that fluctuations and changes in volume or character of employment brought about solely by other causes are not within the purview of this Agreement. The term "Project", as used in this Agreement shall not be limited to the particular facility assisted by federal funds, but shall include any changes, whether organizational, operational, technological or otherwise, which are traceable to the assistance provided, whether they are the subject of the grant contract, reasonably related thereto, or facilitated thereby.

2. The Project shall be carried out in such a manner and upon such terms and conditions as will not in any way adversely affect employees covered by this agreement.

3. (a) All rights, privileges (including pension rights and benefits) of employees of the Authority in classifications represented by the Labor Organizations signatory hereto (including employees already retired) under the existing collective bargaining agreements or otherwise shall be preserved and continued unless changed, altered or amended as provided in said collective bargaining agreements.

3. (b) The Authority shall similarly protect such rights, privileges and benefits of other employees covered by this agreement who are in the service area of the Authority against any worsening of such rights, privileges and benefits as a result of the Project.

4. The collective bargaining rights of employees of the Authority represented by Labor Organizations signatory hereto including the right to arbitrate labor disputes and to maintain union security and check-off arrangements, to the extent such are provided for by applicable laws and/or existing collective bargaining agreements, or otherwise shall be preserved and continued. If, at any time, applicable state law or the collective bargaining agreement permit or grant to the employees of the Authority the right to utilize any economic measures, nothing in this agreement shall be deemed to foreclose the exercise of such right.

5. (a) In the event the Authority contemplates any change in the organization or operation of its system as a result of the Project which may result in the dismissal, displacement or re-arrangement of the employees represented by the labor organizations signatory to this Agreement, the Authority shall do so only in accordance with the provisions of subparagraph (b) hereof.

(b) The Authority shall give to said labor organizations at least ninety (90) days written notice of such change by certified mail. Such notice shall contain a full and adequate statement of the proposed changes, including the approximate number of employees and classifications which may be affected by such change, and the number and classification of any jobs with the Authority which are available and may be filled by such affected employees.

At the request of either the Authority or the representatives of the affected employees, negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this agreement shall commence immediately. These negotiations shall include determining the selection of forces from among the employees of other carrier employers who may be affected as a result of the Project, to establish which such employees shall be offered employment with the Authority for which they are qualified or can be trained; not, however, in contravention of collective bargaining agreements relating thereto. If no agreement is reached within thirty (30) days from the commencement of negotiations, any party to the dispute may submit it in accordance with the procedures contained in paragraph 13(a) hereof.

6. (a) Whenever an employee retained in service, recalled to service, or employed pursuant to paragraphs 5, 7(e), or 14 hereof is placed in a worse position with respect to compensation as a result of the Project, he shall be paid a monthly "displacement allowance" to be determined in accordance with this paragraph. Said displacement allowance shall be paid each displaced employee during the protective period following the date on which he is first "displaced" and shall continue during the protective period so long as the employee is unable, in the exercise of his seniority rights, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, adjusted to reflect subsequent general wage adjustments, including cost of living adjustments.

(b) The displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee, including vacation allowances, monthly compensation guarantees and any other pay allowances or guarantees, and his total time paid for during the last twelve (12) months in which he performed compensated service more than fifty per centum of each such months, based upon his normal work schedule, immediately preceding the date of his displacement as a result of the Project, and by dividing separately the total compensation and the total time paid for by twelve (12), thereby producing the average monthly compensation and the average monthly time paid for. Such allowance shall be adjusted to reflect subsequent general wage adjustments, including cost of living adjustments. If the displaced employee's compensation in his current position is less in any month during his protective period than the aforesaid average compensation (adjusted to reflect subsequent general wage adjustments, including cost of living adjustments), he shall be paid the difference, less compensation for any time

lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time, but he shall be compensated in addition thereto at the rate of the current position for any time worked in excess of the average monthly time paid for. If the displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence to which he is entitled under the then-existing collective bargaining agreement, and which carries a wage rate and compensation equal to or exceeding those of the position which he elects to retain he shall thereafter be treated, for the purposes of this paragraph, as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for cause.

7. (a) Whenever any employee is laid off or otherwise deprived of employment as a result of the Project, in accordance with any collective bargaining agreement applicable to his employment, he shall be considered a "dismissed employee" and shall be paid a monthly dismissal allowance to be determined in accordance with this paragraph. Said dismissal allowance shall first be paid each dismissed employee on the thirtieth (30th) day following the day on which he is "dismissed" and shall continue during the protective period, as follows:

Employee's length of service prior to adverse effect	Period of Protection
1 day to 6 years	equivalent period
6 years or more	6 years

The monthly dismissal allowance shall be equivalent to one-twelfth (1/12th) of the total compensation received by him in the last twelve (12) months of his employment in which he performed compensation service more than 50 per centum of each such month based on his normal work schedule to the date on which he was first deprived of employment as a result of the Project. Such allowance shall be adjusted to reflect subsequent general wage adjustments, including cost of living adjustments.

(b) An employee shall be regarded as deprived of employment and entitled to a dismissal allowance when the position he holds is abolished as a result of the Project or when the position he holds is not abolished but he loses that position as a result of the exercise of seniority rights by an employee whose position is abolished as a result of the Project or as a result of the exercise of seniority rights by other employees brought about as a result of the Project; and he is unable to obtain another position, either by the exercise of his seniority rights, or through the Authority, in accordance with subparagraph (e). In the absence of proper notice followed by such an agreement or award pursuant to paragraph 5 hereof, no employee who has been deprived of employment as a result of the Project shall be required to exercise his seniority rights to secure another position in order to qualify for a dismissal allowance hereunder.

(c) Each employee receiving a dismissal allowance shall keep the Authority informed as to his current address and the current name and address of any other person by whom he may be regularly employed, or if he is self-employed.

(d) The dismissal allowance shall be paid to the regularly assigned incumbent of the position abolished. If the position of an employee is abolished when he is absent from service he will be entitled to the dismissal allowance when he is available for service. The employee temporarily filling said position at the time it was abolished will be given a dismissal allowance on the basis of that position, until the regular employee is available for service, and thereafter shall revert to his previous status and will be given the protections of the agreement in said position, if any are due him.

(e) An employee receiving a dismissal allowance shall be subject to call to return to service by his former employee after being notified in accordance with the terms of the then existing collective bargaining agreement. Prior to such call to return to work by his employer, he may be required by the Authority to accept reasonably comparable employment which carries a wage rate and compensation equal to or exceeding that of his former position adjusted to reflect subsequent wage increases and cost of living adjustments, and for which he is physically and mentally qualified or for which he can become qualified after a reasonable training or retraining period, provided it does not require a change in residence or infringe upon the employment rights of other employees under then existing collective bargaining agreements.

(f) When an employee who is receiving a dismissal allowance again commences employment in accordance with subparagraph 7(e) above, said allowance shall cease while he is so reemployed and the period of time during which he is so reemployed shall be deducted from the total period for which he is entitled to receive a dismissal allowance. During the time of such reemployment, he shall be entitled to the protections of this Agreement to the extent they are applicable.

(g) The dismissal allowance of any employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings from such other employment or self-employment, any benefits received from any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his union representative, and the Authority shall agree upon a procedure by which the Authority shall be kept currently informed of the earnings of such employee in employment other than with his former employer, including self-employment, and the benefits received.

(h) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the failure of the employee without good cause to return to service in accordance with the working agreement or to accept employment as provided under subparagraph (e) above, or in the event of his resignation, death, retirement, or dismissal for cause.

8. In determining length of service of a dismissed employee for purposes of this agreement, such employee shall be given full seniority credits in accordance with the records and labor agreements applicable to him in his former employment and he shall be given continuing seniority credits for each month in which he receives a dismissal allowance as if he were continuing to perform services for his former employer, provided, however, that this paragraph shall not be deemed to enlarge upon the employee's protective period as defined in paragraph 18, nor to enlarge upon the benefit levels otherwise provided by this agreement.

9. No employee receiving a dismissal allowance shall be deprived during the protective period of any benefits attached to his previous employment, such as group life insurance, hospitalization, medical care and free transportation, as well as any other benefits to which he may be entitled under the same conditions and so long as the benefits continue to be accorded to other employees of the bargaining unit, in active service or laid off, as the case may be.

10. (a) Any employee covered by this Agreement who is retained in the service of his employer, or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment in order to retain or secure active employment with his employer, or the Authority in accordance with this Agreement, and who is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects, for the traveling expenses for himself and his immediate family, including living expenses for himself and his immediate family, and for his own actual wage loss during the time necessary for such transfer and for a reasonable time thereafter, not to

exceed five (5) working days. The exact extent of the responsibility of the Authority under this paragraph, and the ways and means of transportation, shall be agreed upon in advance between the Authority and the affected employee or the representative. No claim for reimbursement shall be paid under the provisions of this paragraph unless such claim is presented to the Authority within ninety (90) days after the date on which the expenses were incurred.

(b) If any such employee is laid off within three (3) years after changing his point of employment in accordance with paragraph (a) hereof and elects to move his place of residence back to his original point of employment, the Authority shall, to the same extent provided in subparagraph (a) hereof, assume the expense of moving his household and other personal effects.

(c) Except as otherwise provided in subparagraph (b), changes in places of residence, subsequent to the initial changes as a result of the Project, which are not the result of the Project but grow out of the normal exercise of seniority rights, shall not be considered to be within the purview of this paragraph.

11. (a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of his employer (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment as a result of the Project, and is thereby required to move his place of residence:

If the employee owns his own home in the locality from which he is required to move, he shall, at his option, be reimbursed by the Authority for any loss suffered in the sale of his home for less than its fair market value, plus conventional fees and closing costs, such loss to be paid within thirty (30) days of settlement or closing on the sale of the home. In each case, the fair market value of the home in question shall be determined, as of a date sufficiently prior to the date of the Project so as to be unaffected thereby. The Authority shall, in each instance, be afforded an opportunity to purchase the home at such fair market value before it is sold by the employee to any other person and to reimburse the seller for his conventional fees and closing costs.

If the employee is under a contract to purchase his home, the Authority shall protect him against loss under such contract, and, in addition, shall relieve him from any further obligation thereunder.

If the employee holds an unexpired lease of a dwelling occupied by him as his home, the Authority shall protect him from all loss and cost in securing the cancellation of said lease.

(b) No claim for loss shall be paid under the provisions of this paragraph unless such claim is presented to the Authority within ninety (90) days after the date the employee is required to move.

(c) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through a joint conference between the employee, or his union representative, and the Authority. In the event they are unable to agree, the dispute or controversy may be referred by the Authority or the union to a board of competent real estate appraisers selected in the following manner: one (1) to be selected by the representatives of the employee and one (1) by the Authority and these two, if unable to agree within thirty (30) days upon the valuation, shall endeavor by agreement within ten (10) days thereafter to select a third appraiser or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the real estate commission of Massachusetts to designate within ten (10) days a third appraiser, whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the neutral appraiser, including expenses of the appraisal board, shall be borne equally by the parties

to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

(d) The phrase "change in residence", when used in this agreement shall have the following meanings:

1. When the employees of the Authority represented by the Labor Organizations signatory to this Agreement are so affected—said phrase shall mean a transfer to a work location which is located outside the radius of 20 miles of the employee's former work location and farther from his residence than was his former work location.

2. When the employees of private mass transportation carriers represented by the Labor Organizations signatory to this Agreement are so affected—said phrase shall mean transfer to a work location which is located more than 30 normal highway route miles from his residence and also farther from his residence than was his former location.

12. If any employer of the employees covered by this Agreement or the Authority shall have rearranged or adjusted its forces in anticipation of the Project, with the effect of depriving an employee of benefits to which he should be entitled under this agreement, the provisions of this agreement shall apply to such employee as of the date when he was so affected.

13. (a) In the event there arises any dispute or controversy (except as defined in paragraph 11 hereof) with respect to the protection afforded by this Agreement, or with respect to the interpretation, application or enforcement of the provisions of this Agreement, which cannot be settled by the parties hereto within thirty (30) days after the dispute or controversy first arises, it may be submitted at the written request of any such party to final and binding arbitration or adjustment in accordance with the following arrangements:

(1) Any such labor dispute involving solely employees of the Authority covered by this Agreement shall be referred to arbitration in accordance with the arbitration procedures set forth in any then-applicable collective bargaining agreement between the Authority and the Union representing such employees. The term "labor dispute", as used in this paragraph, shall be broadly construed and shall include any controversy concerning wages, salaries, hours, working conditions, or benefits, including health and welfare, sick leave, insurance or pension or retirement provisions, the making or maintaining of collective bargaining agreements, the terms to be included in such agreements, the interpretation or application of such agreements, the adjustment of grievances, and any claim, difference, or controversy arising out of, or by virtue of, the within arrangements for the protection of employees.

(2) Any such labor dispute involving solely employees covered by this agreement who are subject to the Railway Labor Act, as amended, shall be referred for adjustment in accordance with the terms of said Act, provided that if the Authority shall not have the power to invoke such procedures, it may refer such dispute to arbitration pursuant to the Rules of the American Arbitration Association.

(3) Any other labor dispute involving multiple parties or otherwise outside the scope of the foregoing subparagraphs (1) or (2) shall be submitted, at the written request of any of the parties to this Agreement, to a single arbitrator mutually acceptable to the parties involved in the dispute. Failing mutual agreement within thirty (30) days as to the selection of an arbitrator, the parties involved shall request the Secretary of Labor to appoint an arbitrator. The arbitrator shall convene the hearing within fifteen (15) days after his selection or appointment and shall render his decision within forty-five (45) days after the hearing of the dispute or controversy has been concluded and the record closed.

(b) Authority of the arbitrator or Board of Arbitrators shall be limited to the determination of the dispute or controversy arising out of the interpretation, application or

operation of the provisions of this Agreement. The Arbitrator or Board of Arbitration shall not have any authority whatsoever to alter, amend, or modify any of the provisions of any existing collective bargaining agreement.

(c) The salaries and expenses of the neutral member, any any other jointly incurred expenses, shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(d) In the event of any dispute as to whether or not a particular employee was laid off or otherwise deprived of employment, placed in a worse position with respect to his employment, or required to change his place of residence as a result of the Project, it shall be such employee's obligation to specify, if possible, the adverse effect which he has suffered. It shall then be the Authority's burden to establish affirmatively that any such deprivation, worsening of employment, or change of residence as claimed by the employee, was not a result of the Project by proving that factors other than the Project affected the employee. The claiming employee shall prevail if it is established that the Project had an effect upon his employment even if other factors may also have affected the employee.

14. During his protective period a dismissed employee shall, if he so requests, be granted priority of employment or reemployment to fill any vacant position within the jurisdiction and control of the Authority, reasonably comparable to that which he held when dismissed, for which he is, or by training or retraining can become, qualified; not, however, in contravention of collective bargaining agreements relating thereto. In the event such employee requests such training or re-training to fill such vacant position, the Authority shall provide for such training or retraining at no cost to the employee. The employee shall be paid the salary or hourly rate provided for in the applicable collective bargaining agreement for such position, plus any displacement allowance to which he may be otherwise entitled. If such dismissed employee who has made such a request fails without good cause within ten (10) days to accept an offer of a position comparable to that which he held when dismissed for which he is qualified, or for which he has satisfactorily completed such training he shall, effective at the expiration of such ten (10) day period, forfeit all rights and benefits under this Agreement.

15. A dismissed employee entitled to protection under this agreement may, at his option, resign and (in lieu of all other benefits and protections provided in this Agreement or any other agreement) accept a lump sum payment computed in accordance with Section 9 of the Washington Job Protection Agreement of May, 1936.

16. The Authority will be financially responsible for the application of these conditions and will make the necessary arrangements so that any employee affected as a result of the Project may file a claim through his union representative with the Authority within sixty (60) days of the date he is terminated or laid off as a result of the Project, or within eighteen (18) months of the date his position with respect to his employment is otherwise worsened as a result of the Project, as provided by paragraph 6; provided, in the latter case, if the events giving rise to the claim have occurred over an extended period, the 18-month limitation shall be measured from the last such event. Unless such claims are filed with the Authority within said time limitations, the Authority thereafter will be relieved of all liabilities and obligations related to said claims. The Authority will honor the claim by making appropriate payments or will give notice to the claimant and his representative of the basis for denying or modifying such claim, giving reasons therefor. In the event the Authority fails to honor such claim, the union may invoke the following procedures for further joint investigation of the claim by giving notice in writing of its desire to pursue such procedures. Within ten (10) days from the receipt of such notice, the parties shall exchange such factual material as may be

requested of them relevant to the disposition of the claim; shall honor all reasonable requests for information; and shall jointly take such steps as may be necessary or desirable to obtain from any third party such additional factual material as may be relevant. In the event the claim is so rejected by the Authority, the claim may be processed to arbitration as hereinabove provided by paragraph 13. Prior to the arbitration hearing, the parties shall exchange a list of intended witnesses. In conjunction with such proceedings, the impartial arbitrator shall have the power to subpoena witnesses upon the request of any party and to compel the production of documents and other information which is relevant to the disposition of the claim.

17. Nothing in this Agreement shall be construed as depriving any employee of any rights or benefits which such employee may have under any existing job security or other protective conditions or arrangements by collective bargaining agreement or law, including Public Law 93-236, enacted January 2, 1974; provided that there shall be no duplication of benefits to any employees, and, provided further, that any benefit under this agreement shall be construed to include the conditions, responsibilities and obligations accompanying such benefit.

18. Whenever used herein, the term "protective period" means that period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed, to the expiration of six (6) years therefrom; provided, however, that the protective period for any particular employee during which he is entitled to receive the benefits of these provisions shall not continue for a longer period, following the date he was displaced or dismissed, then the employee's length of service, as shown by the records and labor agreement applicable to his employment prior to the date of his displacement or his dismissal. For purposes of determining the protective period of a particular employee, the employee's length of service shall be measured in accordance with section 7(b) of the Washington Job Protection Agreement of May, 1936.

19. No provisions, terms or obligations herein contained shall be affected, modified, altered or changed in any respect whatsoever by reason of any agreement made by the Authority with employers of employees covered by this Agreement.

20. In the event any provision of this Agreement is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this Agreement shall not be affected, and the parties shall attempt to arrive at a mutually satisfactory agreement on an adequate replacement under section 13(c) of the Act. Failing to agree, any party may invoke arbitration under the provisions of paragraph 13 of this Agreement, to determine a substitute provision which shall be incorporated in this Agreement, and any other appropriate action, remedy, or relief.

21. Any other labor organization which is the certified or recognized collective bargaining representative of Mass Transportation employees in the service area of the Project, and who are effected by the Project within the meaning of 49 U.S.C.A. 1609(c), may give written notice of its intention to become a party to this Agreement to the original signatories and to the Secretary of Labor, within sixty (60) days of the date of the original execution of this Agreement.

If the original signatories to this Agreement do not agree that such labor organization should become a party, then the dispute as to whether such labor organization shall become a signatory shall be determined by the Secretary of Labor.

22. (a) It is the intent of this Agreement to provide employee protections which meet the requirements of Section 13(c) of the Act, and are not less than the benefits established pursuant to Section 5(2)(f) of the Interstate Commerce Act and Section 405(b) of the Rail Passenger Service Act of 1970, as amended. In so doing, changes in wording and organization from arrangements earlier developed under Section 5(2)(f) and section 405(b) have been neces-

sary to make such benefits applicable to this Project. In making such changes, it is not the intent of this Agreement to diminish such benefits. Thus, the terms of this Agreement are to be resolved in favor of this intent to provide employee protection and benefits no less than those established pursuant to Section 5(2)(f) of the Interstate Commerce Act and section 405(a).

(b) In the event the Authority should propose a change as a result of the Project which would constitute a "coordination" as defined by the Washington Agreement, or an acquisition of an existing transportation system as provided by Section 13(c)(4) of the Urban Mass Transportation Act, as amended, the Authority shall proceed with such coordination or acquisition only in accordance with the provisions of Sections 4 and 5 of the Washington Agreement.

23. In the event the Project is approved for assistance under the Act, the foregoing terms and conditions shall be made part of the contract of assistance between the Federal government and the applicant for Federal funds; provided, however, that this agreement shall not merge into the contract of assistance but shall be independently binding and enforceable by and upon the parties hereto, in accordance with its terms, nor shall any collective bargaining agreement merge into this Agreement, but each shall be independently binding and enforceable by and upon the parties thereto, in accordance with its terms.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement by their respective duly authorized representatives this 10th day of December, 1974.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 79-2058-S

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, ET ALS.,
PLAINTIFFS,

v.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
DEFENDANT.

JOINT AFFIDAVIT

Plaintiff, Division 589, Amalgamated Transit Union and Defendant, Massachusetts Bay Transportation Authority, hereby affirm that, pursuant to this Court's Order of March 17, 1981, the parties have begun the process of arbitration and will continue to engage in such arbitration, all as set forth in this Court's Order of March 17, 1981.

Nothing in this Affidavit is intended to nor shall it operate to waive, abandon or affect the parties' rights to appeal this Order, or any other Order, and findings of fact or rulings of law pursuant thereto, or to pursue relief pending appeal or

pursue any other rights in this or other litigation. The parties hereby reserve all such rights.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY
By its attorney,

s/ _____
Joseph H. Elcock, General Counsel
50 High Street, Boston, MA 02110
(617) 722-3156

LOCAL DIVISION 589,
AMALGAMATED TRANSIT
UNION, AFL-CIO
By its attorney,

s/ _____
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 79-2058-S

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, ET AL.,
PLAINTIFFS,

v.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
DEFENDANTS.

ORDER

This case coming on to be heard on Plaintiff, Division 589, Amalgamated Transit Union, Motion for Injunction Pending Appeal after argument, and in consideration of the briefs, it is hereby ORDERED, ADJUDGED and DECREED that:

(1) Plaintiff's Motion for Stay or Injunction Pending Appeal is hereby denied except that

(2) The M.B.T.A. shall not lay off employees represented by the Plaintiff, Division 589, Amalgamated Transit Union, in the following categories until sixty days from date of this Order, which date may be extended by further Order of Court upon application by one of the parties:

(a) non-miscellaneous employees hired before August 8, 1979; and

(b) all other permanent employees in any other classification regardless of when hired.

(c) The parties shall proceed to interest arbitration as set forth in the Court's Order of March 17, 1981; once begun, arbitration shall proceed from day to day unless an alternative schedule is approved by this Court.

s/ _____
Walter Jay Skinner
United States District Judge

Dated: March 20, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 79-2058-S

BOSTON LODGE 264, DISTRICT 38,
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
PLAINTIFF,

v.

THE MASSACHUSETTS BAY
TRANSPORTATION AUTHORITY,
DEFENDANT.

**PLAINTIFF'S MOTION
TO COMPEL ARBITRATION**

Now comes the Plaintiff, Boston Lodge 264, District 38, of the International Association of Machinists and Aerospace Workers, AFL-CIO, and moves this Court to compel the Defendant, The Massachusetts Bay Transportation Authority, to arbitration over the Defendant's denial of cost-of-living adjustments guaranteed to the members of the Plaintiff Lodge 264 by the terms of its collective bargaining agreement with the Defendant MBTA and in support thereof states:

1. Plaintiff has filed a Motion to Intervene as a Plaintiff and a Complaint in this case pursuant to Fed. R. Civ. P. 24(b)(2), on February 17, 1981, requesting declaratory and injunctive relief under 28 U.S.C. § 1601 *et seq.*

2. The Plaintiff and the Defendant MBTA are parties to a collective bargaining agreement, which agreement is attached to the Plaintiff's Complaint as Exhibit A.

3. Article IV of said agreement between the parties establishes a formula and a calendar scheme for the payment of a cost-of-living adjustment. Said adjustment is to be paid on a quarter-annual basis with payments in March, June, September and December in each year of the said agreement.

4. Article IV, Section C, Paragraph 6 of said agreement between the parties states:

> Quarter-annual adjustments shall continue to be made in the same manner during the term of the Agreement and during any period of negotiations thereafter, unless and until the Parties, by agreement, provide otherwise.

5. As more fully set forth in the Affidavit of Anthony Mastandrea, which accompanies this Motion, while the provisions of the parties' collective bargaining agreement were in full force and effect, the Defendant MBTA refused and failed and continues to refuse and fail to render the cost-of-living adjustments due to the members of the Plaintiff union for December, 1980 and March, 1981, notwithstanding the provisions of Article IV of the said agreement.

6. As more fully set forth in the Affidavit of Anthony Mastandrea, the Defendant MBTA has refused and continues to refuse to engage in arbitration over its continuing refusal and failure to pay the contractually-required cost-of-living adjustment. Said arbitration is the contractually-required mechanism for the resolution of this dispute and is fully stated in Article XL of said agreement.

In further support of this Motion, the Plaintiff cites as authorization the Order of the United States Court of Appeals

for the First Circuit dated and entered April 9, 1981, in the cases *Local Division 589, Amalgamated Transit Union, AFL-CIO, CLC*, Plaintiff, Appellant *v. Commonwealth of Massachusetts, et al.*, Defendants, Appellees, No. 81-1180 and *Local Division 589, Amalgamated Transit Union, AFL-CIO, et al.*, Plaintiffs, Appellees *v. Commonwealth of Massachusetts, et al.*, Defendants, Appellants, No. 81-1198, a copy of which is attached hereto, wherein this Court is specifically authorized to decide in its discretion any directly related matters.

WHEREFORE, the Plaintiff prays that this Court:

1. Issue an Order compelling the Defendant MBTA to submit this matter to final and binding arbitration in accordance with the terms of the collective bargaining agreement between the parties as soon as is practicable; and

2. Grant such further relief as may be just and proper.

For the Plaintiff,

BOSTON LODGE 264, DISTRICT 38,
INTERNATIONAL ASSOCIATION
OF MACHINISTS AND
AEROSPACE WORKERS

By its attorney,

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DOCKET ENTRY
CIVIL ACTION NO. 79-2058-S

LOCAL DIVISION 589, AMALGAMATED
TRANSIT UNION, AFL-CIO,
PLAINTIFF,

v.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
DEFENDANTS.

ORDER ON MOTIONS FOR CLARIFICATION AND RECONSIDERATION OF MEMORANDUM OF MARCH 17, 1981

May 15, 1981

SKINNER, D.J.

Several of the parties seek clarification and reconsideration of my memorandum and order of March 17, 1981. That order was prepared in some haste to meet an exigency created by impending layoffs of MBTA employees. There are undoubtedly some lacunae and inconsistencies in it, but I do not think it worthwhile to attempt to rework the whole order at this time. This matter is scheduled for argument within three weeks before the Court of Appeals, which will have the opportunity to give authoritative direction to the case. There are several clarifications, however, which may be useful as a guide to the ongoing arbitration and to assist the Court of Appeals:

1. Although the language in Part X(b) of the memorandum is arguably broader, I do not consider that either the contract clause of the Constitution or the 13(c) agreement imposes any obligation to expand the areas of collecti- e bargaining. Withdrawal of subjects open to collective bargaining under the provisions of existing contracts is prohibited, in my opinion, as stated in Part VI of the memorandum.

2. At the time I wrote the March 17 memorandum, it was my understanding that the MBTA and the Transit Union were seeking in the summer and fall of 1980 to further amend their 1973 collective bargaining agreement. It was asserted at argument on May 13, 1981, by the Assistant Attorney General for the Commonwealth that the parties have agreed to terminate the 1973 agreement and write a new one.[1] This is not clear to me from the record, nor did I get any sense of the views of the MBTA and the Transit Union at this point.

If what is proposed is a new contract, the new contract may comply with the recent Massachusetts statutes to a greater degree than in the case of an amendment. The contract clause of itself does not prevent legislative regulation of subsequent contracts. The emphasis thus shifts to § 13(c) of the Urban Mass Transportation Act and the agreement entered into by the MBTA and its unions thereunder. The critical section is Section 4. As I stated on March 17, in my opinion, the obligation to preserve arbitration is subject to applicable laws which may be passed from time to time. The arbitration provisions of a new contract must conform to c. 405 of the Acts of 1978.

In my opinion, the "applicable laws" phrase does not modify the obligation to preserve collective bargaining rights. I

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[1] On March 17, I wrote, "I need not consider what would be necessary to terminate the agreement in this case, because neither party has made any attempt to do so." This sentence did apply to the Transit Union's agreement, not to the Machinists' Union, as I erroneously stated in colloquy with Attorney Gleason.

read the phrase "to the extent such are provided for by applicable laws and/or existing collective bargaining agreements" as referring only to "the right to arbitrate labor disputes and to maintain union security and check-off arrangements." The word "such" was not in my opinion intended to refer to "the collective bargaining rights of employees." Accordingly, even in a new collective bargaining agreement, existing collective bargaining rights must be preserved.

3. The Assistant Attorney General also argues that arbitration is treated separately from collective bargaining in Section 9 of c. 581 of the Acts of 1980, amending M.G.L. c. 161A, § 19F. This section permits the arbitrator in interest arbitration to consider factors traditionally taken into consideration in the public service of the commonwealth, "and which are not precluded from bargaining under § 19 [as amended by Section 8 of said Chapter 581]." The commonwealth suggests that this section is effective to eliminate the subjects listed in Section 8 from arbitration even though Section 8 is not itself effective to withdraw those subjects from collective bargaining. As stated above, arbitration is not as comprehensively protected by the 13(c) agreement as is collective bargaining, and the commonwealth could have withdrawn those subjects from arbitration by appropriate language. They used the phrase "precluded from bargaining under Section 19," however, which, in my view, ties Section 9 of c. 581 to Section 8, notwithstanding the Act's severability clause (Section 25).

While the considerations dealt with in parts 2 and 3 of the memorandum may alter to some extent the legal theories underlying the orders of March 17 and March 20, they do not materially affect the result. As I stated at oral argument, the parties' energies are best devoted to presenting these matters to the Court of Appeals.

4. The commonwealth has filed various affidavits designed to demonstrate the emergent disastrous effect of the Transit Union's work rules. Counsel for the union contests the conclusions reached by the affiants regarding the effect of these rules on the efficiency of the MBTA. Accordingly, I cannot make any useful findings of fact on the latter point without an evidentiary hearing. There appears to be no dispute, however, about the existence of the following work rules for whatever significance they may have:

a. Management may not make temporary reassignments of employees to jobs at locations different from their regular assignment.

b. Employees may not be temporarily reclassified to meet unexpected needs.

c. Rapid transit vehicles within a storage yard must be moved by a yard motorman and may not be moved by the regular operators of the vehicles even if there are not enough yard motormen on duty at a particular time. The yard motormen do not do any other work.

d. Employees may not be assigned to two "details."

e. Overtime is paid on the basis of an eight-hour day rather than a 40-hour week, and in any case must first be offered to senior employees on a system-wide basis. An employee may receive overtime without having worked a full 40-hour week.

f. There is system-wide bidding for jobs on the basis of seniority.

g. Motormen must be assigned to rail maintenance vehicles, but do not operate the vehicle or participate in maintenance.

h. Schedules once assigned may not be changed to meet shifting rider demands, except on a three-month basis.

i. Penalties must be paid to drivers on split runs if the break exceeds two hours. MBTA pays $2.6 million per year in such penalties.

j. There are restrictions on the hiring of part-time drivers.

I make no findings with respect to the effect of the foregoing work rules, or the justification for them, concerning which I have not heard evidence or argument. Furthermore, I express no opinion as to the relevance of any of the above work rules to any issue before me or before the Court of Appeals.

s/ _____
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DOCKET ENTRY
CIVIL ACTION NO. 79-2058-S

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO,
PLAINTIFF,

v.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
DEFENDANT.

ORDER

Upon Motion of Local 589, Amalgamated Transit Union, dated July 24, 1981, the Order of this Court dated March 20, 1981, is hereby further extended to be binding and effective to September 20, 1981.

So ordered.

Dated: July 28, 1981

s/ _____
Walter J. Skinner, Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 79-2058-S

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, CLC,
PLAINTIFF,

v.

COMMONWEALTH OF MASSACHUSETTS, MASSACHUSETTS BAY TRANSPORTATION AUTHORITY, ET AL.,
DEFENDANTS.

MEMORANDUM AND ORDER AFTER REMAND

October 30, 1981

SKINNER, D.J.

Since the conference on this case with counsel for the parties, the Court of Appeals has denied the plaintiff's motion for rehearing. The plaintiff's attorney has declared her attention to apply to the Supreme Court of the United States for a writ of *certiorari*, and this could conceivably result in a stay of the Court of Appeals' mandate. If there is to be a stay, we will know soon enough. In the meantime, the prudent course appears to me to treat the Court of Appeals opinion as establishing the ground rules under which the parties will proceed in the immediate future. This includes recognizing the effectiveness of c. 581 of the Acts of 1980 and c. 405 of the Acts of 1978.

After listening to counsel at length, I conclude that an effort to salvage anything useful out of the arbitration proceedings that have gone forward since last spring is likely to be more trouble and more provocative of controversy than it is worth.

Accordingly, I direct that the present arbitration proceeding be stayed, and any records, exhibits, notes and transcripts of the hearings be preserved by the arbitrators until further order of the court.

s/ _____
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DOCKET ENTRY
C.A. 79-2058-S

BOSTON LODGE 264, DISTRICT 38, I.A.M.A.W. AND LOCAL DIVISION 598, A.T.U.

v.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.

NOTICE OF WITHDRAWAL OF MOTION

Now comes the Plaintiff, Boston Lodge 264, District 38, International Association of Machinists and Aerospace Workers, AFL-CIO, in the above-captioned action and gives notice to this Court and to all the parties of withdrawal of its Motion To Compel Arbitration, which Motion was originally filed in this Court on April 16, 1981.

Respectfully submitted,

For the Plaintiff Boston Lodge 264,
District 38, International
Association of Machinists and
Aerospace Workers

By its attorney,

s/ _____

William J. Riley
Flamm, Kaplan, Paven & Feinberg
50 Congress Street
Boston, MA 02109
617-742-7811

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1198.

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, CLC,
PLAINTIFF, APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
DEFENDANTS, APPELLEES.

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, ET AL.,
PLAINTIFFS, APPELLEES,

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
DEFENDANTS, APPELLANTS.

CAMPBELL, BOWNES AND
BREYER, *Circuit Judges.*

ORDER OF COURT

Entered April 9, 1981

After hearing, it is ordered as follows:
The motion for injunction pending appeal is denied.

The appeals in the above two cases are consolidated for the purpose of briefing and argument and the cases are assigned for hearing at the June, 1981 session.

The parties are authorized and encouraged to seek speedy resolution of all directly related matters whether in the state or district courts, and the district court is authorized in its discretion to decide any such matters notwithstanding the pendancy of these appeals.

Briefs for all parties are to be filed on or before May 22, 1981, and the parties are excused from filing an appendix.

By the Court:

DANA H. GALLUP, Clerk.

By /s/ Francis Seigliano
Chief Deputy Clerk.

[Cert. c., Clerk, U.S.D.C., Mass.]
[cc: Ms. Hirshman and Messrs. Elcock, Taylor, Golann, Riley and Kelly.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1180

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, ALF-CIO, CLC,
Plaintiff, Appellant,

v.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Defendants, Appellees.

No. 81-1198

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, ET AL.,
Plaintiffs, Appellees,

v.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Defendants, Appellants.

No. 81-1219

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO,
Plaintiff, Appellee,

v.

THE COMMONWEALTH OF MASSACHUSETTS
Defendant, Appellee,

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Walter Jay Skinner, *U.S. District Judge*]
[511 F. Supp. 312 (D. Mass. 1981)]

Before
Campbell, Bownes and Breyer,
Circuit Judges.

Linda R. Hirshman, with whom *Jacobs, Burns, Sugarman & Orlove*, *Earle Putnam*, General Counsel, *Douglas Taylor*, and *Gromfine, Sternstein, Rosen and Taylor, P.C.* were on brief, for Local Division 589, Amalgamated Transit Union.

Dwight Golann, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, *Mitchell S. Sikora, Jr.*, *Bruce Mohl*, *Stephen M. Limon*, Assistant Attorneys General, and *Max Beck* were on brief, for the Commonwealth of Massachusetts, et al.

Joseph Elcock, General Counsel, with whom *Ronald G. Busconi*, Assistant General Counsel, was on brief for the Massachusetts Bay Transportation Authority.

William J. Riley, and *Flamm, Kaplan, Paven & Feinberg* on brief for the Boston Lodge 264, District 38, International Association of Machinists and Aerospace Workers.

September 30, 1981

BREYER, *Circuit Judge*. This case raises two difficult and important sets of questions concerning collective bargaining and rapid transit. First, can the Commonwealth of Massachusetts enact statutes that are inconsistent with assurances that its Transit Authority previously gave the Secretary of Labor as part of an application for federal grant money? Second, do those Massachusetts statutes unconstitutionally impair pre-existing collective bargaining contracts? We find that insofar as federal law is concerned, the state statutes are valid.

I

A

Since 1912 appellant, Local 589 of the Amalgamated Transit Union (the "Transit Union") has represented most Boston transit system employees. Before 1947, it negotiated contracts with the system's private owners (Boston Elevated Railway). Since 1947, it has negotiated with the system's public owner, which is now the Massachusetts Bay Transportation Authority (MBTA).[1] The MBTA is a public agency with power to enter into binding agreements on behalf of the Commonwealth.[2]

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[1] In 1947, Boston Elevated Railway was purchased by a public entity, the Metropolitan Transportation Authority (MTA). As a result of the takeover, MTA workers became public employees; Section 19 of the enabling act, Chapter 544 of the Acts of 1947, authorized the MTA to bargain collectively and to submit contract disputes to binding interest arbitration.

[2] In 1964, Congress enacted the Urban Mass Transportation Act, 49 U.S.C. §§ 1601-1613. Under that statute, federal money flows only to state and local public bodies and agencies. 49 U.S.C. § 1602(a)(1). In order to take advantage of the available federal funds, the Massachusetts legislature converted the MTA to the MBTA in 1964. Mass. Gen. Laws Ann. ch. 161A. Pursuant to state law, "[t]he authority is authorized and directed from time to time to take all necessary action to secure any federal assistance which is or may become available . . . for any of the purposes of this chapter. . . ." Mass. Gen. Laws Ann. ch. 161A, § 29 (cum. supp. 1981). The MBTA is also authorized "to bargain collectively with labor organizations representing

On January 1, 1973, the Transit Union and the MBTA entered into a detailed agreement setting forth wages, hours and working conditions. We shall refer to that agreement as the Basic Agreement. Its most important provisions for present purposes are those governing the procedure for changing its terms.

As read literally, the Basic Agreement provides that its terms will remain in effect forever unless (1) *both* parties agree to a change *or* (2) an arbitration panel changes the Agreement's terms. The Agreement invokes a type of arbitration called "interest arbitration". Unlike "grievance arbitration," which involves the interpretation and application of existing contractual provisions, "interest arbitration" involves the creation of new substantive contractual terms, which will govern the parties' future relations.[3] To be more specific, the 1973 Basic Agreement provides:

> a) The Basic Agreement and its provisions shall continue in force until December 31, 1975 "and from year to year thereafter unless changed by the Parties" after appropriate notice. (§ 600)
>
> b) After appropriate notice the contract will "be opened up and the change or changes desired shall then be considered . . . ." "Upon failure to reach a mutual agreement upon any of the changes desired . . . the same shall be arbitrated as provided for in this Agreement and the Award shall then be entered into and become a part of this Agreement." (§ 601)

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employees of the authority and to enter into agreements . . . with such organizations. . . ." Mass. Gen. Laws Ann. ch. 161A, § 19 (cum supp. 1981).

[3] For a discussion of interest arbitration, see F. Elkouri & E. Elkouri, How Arbitration Works, 47-48, 50-57 (3rd ed. 1973).

c) Arbitration is to be conducted by a "Board of Arbitration selected in a manner provided in Section 103." (§ 100)

d) The Board of Arbitration shall consist of three members, one selected by the Transit Union, one by the MBTA, and the third chosen from a list of five provided by the American Arbitration Association (through a process of successive striking) of "persons experienced in transportation." (§ 103)

As provided in these sections, the Basic Agreement was "opened up" at the end of 1975. The parties could not agree about the changes they had separately proposed, and they proceeded to arbitration. In 1976, the arbitration panel entered an award changing the Basic Agreement in various ways. But the arbitrators did not change the Agreement's procedure for making changes. And, they stated that "all provisions of the Agreement which are not modified by this Award shall continue in effect." They ruled that the Basic Agreement, as modified, would extend through December 31, 1977.

At the beginning of 1978, the Basic Agreement was again "opened up". Again the parties could not agree about the changes they had separately proposed. This time, however, they did not proceed to arbitration. In May, the Transit Union sought arbitration — and the MBTA began to prepare for arbitration. But in July, the Massachusetts legislature enacted a statute, Chapter 405 of the General Laws. This statute, designed to hold down rapidly rising transit costs, mandated an arbitration procedure somewhat different from that contained in the Basic Agreement. The Transit Union immediately claimed that Chapter 405 was itself inconsistent with the Basic Agreement; and it insisted upon Basic Agreement-type arbitration. The MBTA believed that Chapter 405 was lawful, and it insisted upon Chapter 405-type arbitration.

The impasse was resolved on August 8, 1979 when the parties entered into a "Memorandum of Understanding". The Memorandum began by stating "that the Articles of Agreement entered into as of January 1, 1973, as amended, shall be further amended as follows." The Memorandum went on to make a host of changes in the Basic Agreement, but it did not change the "interest arbitration" provisions in any relevant respect.[4] The Memorandum extended the Basic Agreement as modified by stating "The express term of the Articles of Agree-

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[4]The Memorandum did change sections 600 and 601 (Basic Agreement provisions governing the procedure for changing the Basic Agreement). These changes, however, dealt only with the *notification* provisions, not the *arbitration* provisions. The Memorandum provides in relevant part:

> 4. *Changes in Agreement*
>
> Sections 600 and 601 shall be amended to read as follows:
>
> This Agreement and the provisions hereof shall continue in force and be binding upon the respective parties hereto until and including the thirty-first day of December, 1980, and from year to year thereafter unless changed by the parties. Either of the parties desiring a change in any section or sections of this Agreement shall notify the other party, in writing, that it desires a change at least one hundred and eighty (180) days prior to the thirty-first day of December, 1980, and thereafter, at least one hundred and eighty (180) days prior to the end of each year, which is the thirty-first day of December. Such notification shall include, in writing, all the specific changes desired of either party.
>
> Within ten (10) days of the recept of notification of desired changes, representatives of the parties shall commence negotiations in an effort to reach a mutual agreement upon the changes desired by the parties.
>
> Upon failure to reach an agreement on all the changes desired by the parties ninety (90) days prior to the expiration of the Agreement, the parties shall submit the disputed issues to final and binding arbitration as provided for in this Agreement, and they shall forthwith take such steps as will assure that the arbitrator will be selected within sixty (60) days prior to the expiration of the Agreement. Nothing herein shall preclude the parties from continuing to negotiate in an effort to resolve their defferences during the period, while the procedures for the establishment of arbitration are in process.

ment shall be January 1, 1978, to and including December 31, 1980". In signing the Memorandum, however, the MBTA wrote, "Approved as to form to the extent not inconsistent with Chapter 405 of the Acts of 1978."

At the end of 1980, the Basic Agreement[5] was once again opened up and the parties sought changes. At this point, the legislature, concerned about a possible transit shutdown due to lack of funds, enacted another statute, Chapter 581 of the General Laws. That statute also sought to hold down costs by imposing additional conditions upon the arbitration (and collective bargaining) procedures. The parties immediately reiterated the positions they had taken in 1978. The Transit Union claimed that both Chapters 405 and 581 were illegal and that arbitration must take place in accordance with the Basic Agreement's specified procedure. The MBTA refused to arbitrate except in conformity with Chapters 405 and 581.

The major differences between the two sets of procedures are the following: the Basic Agreement procedure, as previously mentioned, involves three arbitrators. The Transit Union and the MBTA each select one arbitrator. The third, selected by the other two, is to be a person experienced in transportation matters. The arbitration standards used, while unspecified in the Basic Agreement, are presumably those traditionally used in local transit interest arbitration.[6]

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[5] Henceforth, unless the context clearly calls for a different reading, references to the "Basic Agreement" should be read to mean the "Basic Agreement (as amended)".

[6] "The standards used by [interests] arbitrators are not pulled out of the air — nor are they artificially created. They are, generally speaking, the very same ones that are used by the parties in their negotiations. . . .

Without question the most extensively used standard in "interests" arbitration is prevailing practice. . . ."

F. Elkouri & E. Elkouri, *supra* note 3, at 745, 746, 747.

Both the "national comparable cities" standard and area comparisons have been used in the local transit industry. *Id.* at 751 n.20.

By contrast, the 1978 Chapter 405 procedure requires (1) that mediation precede arbitration,[7] (2) that a single arbitrator who is a resident of Massachusetts and "experienced in state and local finance", conduct the arbitration,[8] (3) that the arbitrator "rely primarily" on nine statutory factors, including "the financial ability of the Authority to meet additional costs," and wages, hours and working conditions of comparable Massachusetts employees,[9] (4) that the arbitrator issue a

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[7] Codified at Mass. Gen. Laws Ann. ch. 161A, § 19D (cum. supp. 1981).

[8] Codified at Mass. Gen. Laws. Ann. ch. 161A, § 19E (cum. supp. 1981).

[9] Mass. Gen. Laws Ann. ch. 161A, § 19F (1976), provided:

> The arbitrator shall rely primarily on the following factors in determining the basis for an award:
>
> 1. The financial ability of the authority to meet additional costs, which shall include but not be limited to:
>
> a. the statutory requirement of advisory board approval of the authority's fiscal budget;
>
> b. the financial ability of the individual communities and the commonwealth to meet additional costs;
>
> c. the average per capita tax burden, average annual income and sources of revenue within the commonwealth, and the effect of any arbitration award on the respective property tax rates of the cities and towns within the authority's district.
>
> 2. The overall compensation presently received by the employees, having regard not only for wages for time actually worked but also for wages for time not worked, including vacations, holidays and other excused time.
>
> 3. All benefits received by the employees, including insurance, pension, as well as the continuity and stability of employment.
>
> 4. The hazards of employment, physical, educational and mental qualifications, job training and skills involved.
>
> 5. A comparison of wages, hours, and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services within the commonwealth and with other employees generally in public and private employment within the commonwealth.
>
> 6. The average consumer price for goods and services, commonly known as the cost of living.

written opinion analyzing the application of the statutory factors,[10] and (5) that the arbitrator disallow any provision for cost of living adjustments after the expiration of a contract period.[11] Chapter 581,[12] enacted at the end of 1980, forbids the MBTA to bargain collectively or agree with the Transit Union about "inherent management rights." These rights are defined to include the right to hire, promote, assign, direct and discharge employees,[13] to direct and control programs and departments, to determine staffing levels, to assign overtime,

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7. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

8. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between parties, in the public service of the commonwealth.

9. The stipulation of the parties.

Paragraph 8 was subsequently amended in 1981 by ch. 581. *See* note 14, *infra*.

[10] Codified at Mass. Gen. Laws Ann. ch. 161A, § 19G (cum. supp. 1981).

[11] Mass. Gen. Laws Ann. ch. 161A, § 19G (cum. supp. 1981) provides in relevant part:

> The scope of arbitration shall be limited to wages, hours, and conditions of employment and shall not include any provisions for any cost of living adjustments which are based on changes in the Consumer Price Index after the expiration of the contract period covered by the award. In addition, any wage or salary adjustments shall be expressed in per cent or dollar amounts, and in no case shall there be any provisions for salary adjustments to occur after the expiration of the contract period covered by the award.

[12] Codified at Mass. Gen. Laws Ann. ch. 161A, § 19 (cum. supp. 1981). *See* note 14, *infra*.

[13] The MBTA states in its brief on appeal that its employees may be discharged "for cause" and notes that § 102 of the 1973 Basic Agreement provides that "[t]he Authority will exercise the exclusive right to . . . discharge its employees for cause."

to hire part-time employees, and to decide how to procure goods and services. Chapter 581 also forbids the MBTA to agree to pay pensions that are based upon overtime pay or to provide for automatic cost-of-living adjustments. It removed all of these matters from arbitration.[14]

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[14] As codified at Mass. Gen. Laws Ann. ch. 161A, § 19 (cum. supp. 1981), ch. 581 provides:

> The directors shall have authority to bargain collectively with labor organizations representing employees of the authority and to enter into agreements, with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of such employees; provided, however, that the directors shall no authority to bargain collectively and shall have no authority to enter into collective bargaining agreement with respect to matters of inherent management right which shall include the right:
>
> (*i*) to direct, appoint, employ, assign and promote officers, agents and employees, and to determine the standards therefor.
>
> (*ii*) (A) to discharge and terminate employees subject to the provisions of such clauses (B) and (C).
>
> (B) No action set forth in (A) shall be sustained if, in a proceeding invoked in accordance with the provisions of such clause (C), the employee shall establish by a preponderance of the evidence that it was based upon race, color, religion, sex, age, national origin, handicapping condition, marital status, or political affiliation or activities or union activities or union organizing of the employees; a reprisal against the employee for disclosure of information by an employee which the employee reasonably believes evidences a violation of any law, rule or regulation or mismanagement, a gross waste of funds, or abuse of authority; a reprisal against any employee for the refusal of any person to engage in political activity.
>
> (C) The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration which may be invoked in the event any employee of the authority is aggrieved by any action taken under such clause (A).
>
> (*iii*) to plan and determine the levels of service provided by the authority.
>
> (*iv*) to direct, supervise, control, and evaluate the departments, units and programs of the authority; to classify the various positions of the authority and ascribe duties and standards of productivity therefor.

B

The Transit Union bases its claim that Chapters 405 and 581 are unlawful on two separate constitutional grounds. It makes

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(*v*) to develop and determine levels of staffing and training.

(*vi*) to determine whether goods or services should be made, leased, contracted for, or purchased on either a temporary or permanent basis.

(*vii*) to assign and apportion overtime.

(*viii*) to hire part time employees.

The authority is hereby prohibited from bargaining collectively or entering into any agreement to make pension benefit payments to its employees that are determined in a manner that includes the amount of overtime earnings of said employees.

The authority is hereby prohibited from bargaining collectively or entering into a contract which provides for automatic cost-of-living salary adjustments which are based on changes in the Consumer Price Index or other similar adjustments unless specifically authorized by law. Except as provided in sections nineteen C to nineteen G, inclusive, the employees of the authority shall submit all grievances and disputes pursuant to arbitration provisions in agreement existing at the time of the creation of the authority or subsequently entered into with the authority or, in the absence of such provisions, to the state board of conciliation and arbitration, or other board or body having similar powers and duties. The provisions of general or special laws relative to rates of wages, hours of employment and working conditions of public employees, shall not apply to the authority nor to the employees thereof, but the authority and its employees shall be governed with respect to hours of employment, rates of wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of its employees by the laws relating to street railway companies.

Chapter 581 also amended ch. 405, Mass. Gen. Laws Ann. ch. 161A, § 19F (sum supp. 1981), so that paragraph 9 of that section now provides that

> [t]he arbitrator shall rely . . . on . . . [s]uch other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between parties, in the public service of the commonwealth and which are not precluded from bargaining under section nineteen.

a conceptually simple "Contract Clause" argument. It claims that the Basic Agreement constitutes a contract with the Commonwealth of Massachusetts. Chapters 405 and 581, in its view, unconstitutionally impair the obligations of that contract.[15] The Union also claims that those chapters violate the Supremacy Clause of the Constitution.[16] It argues that they are inconsistent with assurances that Massachusetts gave the Secretary of Labor under the Urban Mass Transportation Act (UMTA), § 13(c), 49 U.S.C. § 1609(c), and that such assurances, given to a federal official, must prevail, as a constitutional matter, over state law to the contrary. A few additional facts about UMTA will help to clarify this argument.

UMTA provides states with federal money to buy and to improve transit equipment and to supplement the operating revenues of local mass transit systems. In 1964 when Congress enacted this law it included in § 13(c) a requirement that, as a condition of obtaining a grant, the Secretary of Labor certify that "fair and equitable arrangments" have been made "to protect the interests of employees affected" by the federal assistance. It adds that these protective arrangements "shall include . . . such provisions as may be necessary for . . . preserving rights, privileges and benefits . . . under existing collective bargaining agreement," continuing "collective bargaining rights . . .," protecting "individual employees against a worsening of their positions with respect to their employment . . ." and so on.[17]

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[15] U.S. Constit. art. I., § 10 provides in relevant part: "no state shall . . . pass any . . . law impairing the Obligation of the Contracts. . . ."

[16] U.S. Constit. art VI, states in relevant part: "the Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ."

[17] Section 13(c) of UMTA, 49 U.S.C. § 1609 provides:

> (c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the

In applying this provision, the Department of Labor has encouraged transit authorities and unions to submit joint, agreed upon, assurances for review. These assurances are typically referred to as § 13(c) agreements. Over the years, the MBTA and the Transit Union have entered into a series of § 13(c) agreements. The most recent one, entered into on December 10, 1974, has been used repeatedly by the MBTA in grant applications, and by the Department of Labor for certification purposes.

The 1974 § 13(c) agreement includes the following assurances, which are directly relevant here:

> a) "All rights, privileges (including pension rights and benefits) of employees . . . under the existing collective bargaining agreements or otherwise shall be preserved and continued unless changed . . . as provided in said collective bargaining agreements." (§ 3a)
>
> b) "The collective bargaining rights of employees . . . including the right to arbitrate labor disputes . . ., to the extent such are provided for by applicable laws and/or ex-

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Secretary of Labor, to protect the interest of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) for this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

isting collective bargaining agreements, or otherwise shall be perserved and continued . . . ." (§ 4)

c) "Any . . . labor dispute . . . shall be referred to arbitration in accordance with the arbitration procedures set forth in any then-applicable collective bargaining agreement . . . . The term 'labor dispute' . . . shall be broadly construed and shall include any controversy concerning wages, salaries, hours, working conditions or benefits, . . . the making or maintaining of collective bargaining agreements, the terms to be included in such agreements . . . ." (§ 13(c)(a)(1)[18]

Ever since the enactment of Chapter 405, the Transit Union has claimed that the procedure there set out is inconsistent with this set of assurances and that the assurances must prevail over state law to the contrary.

The MBTA not only has denied that these assurances prevail, as a matter of federal law, over inconsistent state law, but also has denied that these assurances are inconsistent with Chapters 405 and 581. In its view the assuarances guarantee the union rights only to the extent that those rights are consistent with current state law; the assurances do not protect the union against *changes* in state law. At the urging of the Department of Labor, the parties submitted the question of the meaning of these assurances to an arbitrator. In 1979 that arbitrator, William Fallon, ruled that Chapter 405 "and the MBTA's insistence on arbitrating interest disputes pursuant to those amendments [i.e. Chapter 405] constitute a conflict with pre-existing § 13(c) agreements executed by the parties." He did not determine which should take precedence. The parties

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[18] The 1974 § 13(c) agreement is set out in full in the appendix to the opinion of the district court below, 511 F. Supp. 312, 332-340 (D. Mass. 1981).

continue to dispute whether the § 13(c) assurances are inconsistent with Chapters 405 and 581, and if so, which prevail.[19]

C

The parties have brought three separate sets of legal proceedings designed to vindicate their legal positions. First, the MBTA challenged Arbitrator Fallon's award in state court. That proceeding is currently pending in the Supreme Judicial Court.[20] Second, the Transit Union brought a proceeding in

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[19] We note that initially the MBTA apparently had power to enter into contracts for federal assistance which would impose regulations or practices in conflict with state law. Mass. Gen. Laws Ann. ch. 161A, § 29 (1976) (enacted in 1964) provided broad authority to waive state law in the face of such a conflict and stated in part:

> . . . It is the intent of this section that the provisions of any federal law, administrative regulation or practice governing federal assistance for the purposes of this chapter shall, to the extent necessary to enable the commonwealth or its subdivisions to receive such assistance and not constitutionally prohibited, override any inconsistent provisions of this chapter.

This broad waiver authority was amended and restricted in 1980 by ch. 581, Mass. Gen. Laws Ann. ch. 161A, § 29 (cum. supp. 1981). The language quoted above and other language providing authority to waive state law was repealed. Instead, the legislature provided:

> If the provisions of any federal law, administrative regulation, or practice governing federal assistance for the purposes of this chapter are inconsistent with any provisions of this chapter to the extent that the commonwealth or its political subdivisions are prohibited or potentially prohibited from receiving such assistance, the chairman of the authority shall, within thirty days after the federal government has notified him that an inconsistency may exist, notify the governor, and the clerks of the house and senate of such inconsistency.

[20] The suit in the Supreme Judicial Court of Massachusetts is a declaratory action pursuant to Mass. Gen. Laws Ann. ch. 231A, seeking a declaration that, *inter alia*, ch. 405 violated the § 13(c) agreement, that the arbitrator

the Commonwealth Superior Court to require the MBTA to comply with the Basic Agreement's arbitration procedures despite conflicting state law. The Superior Court enjoined violation of various provisions of the Basic Agreement for six months, but it indicated that (at least for the purposes of injunctive relief) the Basic Agreement may, as a matter of state law, have expired.[21] Finally, the Transit Union brought this action in federal district court, seeking a declaration that Chapters 405 and 581 are unconstitutional, and an injunction requiring the MBTA to arbitrate according to the terms of the Basic Agreement.

On March 17, 1981, the federal district court issued a preliminary injunction. 511 F. Supp. 312 (D. Mass. 1981). Focusing on "the central mutual consideration of the [1971 Basic] [A]greement and the core of the parties' reasonable expectations," 511 F. Supp. at 317, it held that *portions* of Chapters 405 and 581 violated the Contract Clause of the Federal constitution. It found that the remainder of those chapters did not violate the § 13(c) agreement, for it interpreted that agree-

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matter jurisdiction. *Adams* v. *Massachusetts Bay Transportation Authority*, 79-2059-S (D. Mass. December 24, 1980).

[21] In Superior court the Transit Union sought to enforce those provisions of the Basic Agreement that rolled over under §§ 600 and 601 against ch. 581. The Superior Court action was brought not only by the Transit Union, but also by Lodge 264 of District 38 of the International Association of Machinists and Aerospace Workers and other unions who sought to enforce alleged rights under their respective contracts. *See Gallahue* v. *MBTA*, Mass. Superior Court, Suffolk County, No. 45917, slip op. at n.1 (January 7, 1981). For purposes of injunctive relief, the Superior Court enjoined violation of various portions of Lodge 264's collective bargaining agreement until March 2, 1981.

ment as guaranteeing rights only insofar as they are consistent with current state law. It then ordered the parties to arbitrate under a procedure which the court itself created. The court modified the Basic Agreement to incorporate parts of Chapter 405 that it believed were constitutional.[22] The court issued a clarifying order order on May 15, 1981.[23] Both sides have appealed this district court decision. The Transit Union claims that the Basic Agreement's provision must be enforced as written. The MBTA claims that Chapters 405 and 581 are constitutional and govern.

D

The basic legal issues before us on appeal, then, are two. First, do portions of Chapters 405 and 581 violate the Supremacy Clause? Do they conflict with the § 13(c) assurances,

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[22] Essentially, the district court ruled that ch. 405 violates the Contract Clause only insofar as it imposed arbitration by a single arbitrator in place of tripartite arbitration. 511 F. Supp. at 317. The court directed that binding interest arbitration be conducted in accordance with ch. 405, "except that three arbitrators shall be chosen as provided in the collective bargaining agreements and the third or neutral arbitrator shall be (1) experienced in transportation, (2) a legal resident of the Commonwealth of Massachusetts, and (3) experienced in state and local finances." 511 F. Supp. at 318.

With respect to Chapter 581, the district court stated that it violated the Contract Clause "[t]o the extent that . . . [it] . . . withdraws questions of substance from collective bargaining . . . ." 511 F. Supp. at 318. The court further held that "Chapter 581 is not applicable, because it conflicts with the essential provisions of a prior agreement, and its applicability is interdicted by Article I, Section 10, of the United States Constitution [the Contract Clause]." *Id.* at 319.

[23] *See* notes 49 and 57, *infra*. In its memorandum of May 15, the district court ruled, *inter alia*, that §§ 8 and 9 of ch. 581 are in conflict with paragraph 4 of the 1974 § 13(c) agreement, and thus with the Supremacy Clause.

and, if so, do the § 13(c) assurances prevail? Second, do portions of Chapters 405 and 581 unconstitutionally "impair" the obligations of a prior contract? We must also consider a further and totally different issue arising out of a separate claim made by Lodge 264 of District 38 of the International Association of Machinists and Aerospace Workers ("the Machinists").[24] This separate matter will be considered in Part IV of this opinion.

II

We first consider the Transit Union's claim that Chapters 405 and 581 are unconstitutional under the Supremacy Clause because they conflict with the 1974 § 13(c) agreement. The district court held that no such conflict exits, but here we shall assume the contrary. For one thing, an arbitrator, appointed under the terms of the 1974 Agreement has found that a conflict exists. For another thing, the plain language of the § 13(c) agreement quoted above appears to conflict with the two state chapters. Section 4 of the § 13(c) agreement, for example, states that arbitration rights are protected to the extent they are provided for by "applicable laws and/or existing collective bargaining agreements." Yet, the arbitration procedure set forth in Chapter 405 is arguably less favorable to the union than that contained in the "existing" (1973) "collective bargaining agreement." The district court read the language of § 4 to mean that it protected arbitration rights only insofar as those rights were also protected by "applicable law." 511 F. Supp. at 318-319. But the words "and/or" commonly mean

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[24] The Machinists claim that their (separate) collective bargaining agreement prohibits the MBTA from laying off their members. The district court enjoined the proposed lay offs and the MBTA appeals.

"the one or the other or both." And thus § 4 would seem to protect arbitration rights provided by the 1973 "collective bargaining agreement" even if those rights are not provided for by "applicable law." We believe it reasonable for purposes of this opinion to assume that there is a conflict between state law and federal assurance.

The more difficult question is, in case of conflict, which prevails, federal assurance or state law? This is a question of Congressional intent. Barring some constitutional restraint, Congress plainly has the power to enact a law forbidding states that accept federal money from passing laws inconsistent with a federal statute, inconsistent with regulations made pursuant to the statute, or inconsistent with assurances made pursuant to the statute or those regulations. *E.g.*, *King* v. *Smith*, 392 U.S. 309, 333 n.34 (1968). The issue here, therefore, is whether Congress intended § 13(c), or, to be more specific, whether it intended assurances made pursuant to § 13(c), to override conflicting state law. If not, state law governs — although the federal statutory scheme may provide other remedies for violation of an assurance.

The language of the statute does not itself answer the relevant question. It simply provides that "[i]t shall be a condition of assistance . . . that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance." And, it goes on to list certain matters that the "protective arrangements" shall include. 49 U.S.C. § 1609(c). It would be consistent with this language that "arrangements" approved by the Secretary automatically invalidate conflicting state law. It is equally consistent with this language that such "arrangements" do not invalidate state law, but that a state with laws that prevent the making of "fair and equitable arrangements", cannot obtain or retain federal assistance. To decide the Supremacy Clause question, we have examined the UMTA statu-

tory scheme in light of its legislative history and prior case law. Our examination convinces us that Congress intended state law, not § 13(c) assurances, to prevail in case of a conflict. We base this conclusion upon express language contained in the legislative history, upon the fact that a contrary holding risks distorting UMTA's basic purposes, and upon the practical difficulties that would accompany a contrary result.

A

We have examined the statute's legislative history with care. In doing so, we are mindful that the courts ought not to void state statutes — particularly those dealing with local economic matters — in the absence of a clear Congressional intent to preempt them:

> If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of the intention to do so. The exercise of federal supremacy is not lightly to be presumed.

Schwartz v. *Texas*, 244 U.S. 199, 202-203 (1952). *See New York Department of Social Services* v. *Dublin*, 413 U.S. 405, 413 (1973); *cf. National League of Cities* v. *Usery*, 425 U.S. 833 (1976). A careful examination of the legislative history reveals no evidence of any intent that a § 13(c) assurance supersedes state law; rather, that history reveals the contrary.

1. The first UMTA bills, introduced in Congress in the early 1960's, contained no labor protection provisions. Those provisions, which later became § 13(c), appeared in Congress when

Secretary of Labor Willard Wirtz presented them to the Senate and to the House Committees on Banking and Currency in 1963. Secretary Wirtz first pointed out that the Labor Department had drafted the provisions after discussions with the Amalgamated Transit Union and the AFL-CIO. The unions argued that labor protection was needed for two reasons. UMTA money might be used by the states to buy existing private transit companies.[25] Under the law in some states if a private transit system became publicly owned, its workers would lose their rights to strike and to bargain collectively.[26] UMTA funds might also be used for automation leading to a loss of jobs.[27] Thus, as Secretary Wirtz explained it, § 13(c) was to provide "transitional" protection.[28]

Second, Secretary Wirtz explained how the labor protection provisions work. He made clear that the provisions would give the Labor Department a weapon — in the form of UMTA grants — that could be used to encourage states to modify laws to allow, for example, collective bargaining, or to look for ways around existing anti-union statutes.[29] If a state could not

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[25] *See* H.R. Rep. No. 204, 88th Cong., 2d Sess. 4, *reprinted in* [1964] U.S. Code Cong. & Ad. News 2569, 2583; [hereinafter *House Report*]; S. Rep. No. 82, 99 Cong., 1st Sess. 29 (1963) [hereinafter *Senate Report*].

[26] During the hearings on UMTA, labor officials pointed to Dade County, Florida as an illustration of a situation where employees of a privately operated transit system lost their collective bargaining rights when the county took over the operation of the system. *See Urban Mass Transportation — 1963: Hearings on S.6 and S.917 Before the Subcomm. of the Senate Comm. on Banking and Currency*, 88th Cong., 1st Sess. 324, 325 (1963) [hereinafter *Senate Hearings*] (statement of Bernard Cushman); *Urban Mass Transportation Act of 1963: Hearings on H.R. 3881 Before the House Comm. on Banking and Currency*, 88th Cong., 1st Sess. 487 (1963) [hereinafter *House Hearings*] (statement of Andrew J. Bielmiller).

[27] *See* authorities cited at note 25, *supra*.

[28] *Senate Hearings, supra* note 26, at 308.

[29] *See* note 34, *infra*.

satisfy the Secretary that it had found some lawful method to provide the protection that § 13(c) required, the Secretary would prevent the state from receiving UMTA assistance. Thus, Secretary Wirtz testified that § 13(c) would "affect" state law, but it would not "override" state law.[30]

Third, the Secretary emphasized the breadth of the discretionary power the § 13(c) gave to the Labor Department and the "flexibility" with which that discretion must be exercised.[31] Thus, he told the House Committee that the Labor Department had the need for "flexibility" in mind "when the standards in the proposal were drafted."[32] The provisions provided flexibility both because the standard used — "fair and equitable arrangements" — was a highly general one and because the statute allowed the Secretary to take "account of the fact that different answers may be appropriate in different cases."[33] Indeed, in response to questioning, the Secretary stated that the provision did not even require him to withhold funds from a state with a law prohibiting collective bargaining among municipal employees. Even in such a case he would search for ways to work out arrangements that would allow the state to participate in the program.[34]

Fourth, the Secretary specifically focused upon the question of whether § 13(c) assurances would supersede state law. In response to questioning in the Senate, he said, "I should like it quite clear that I think that there should be no superseding here of the State Laws."[35] The Senate Committee Report on the Bill subsequently stated,

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[30] *Senate Hearings*, *supra* note 26, at 312-313.

[31] *House Hearings*, *supra* note 26, at 482.

[32] *Id.*

[33] *Id.*

[34] *House Hearings*, *supra* note 26, at 482-483, 484-485.

[35] *Senate Hearings*, *supra* note 26, at 313.

> In regard to the question as to whether these [§ 13(c)] provisions would supersede State labor laws, the committee concurs in a statement made by the Secretary of Labor "that there could be no superseding of State laws by a provision of this kind."[36]

The Secretary also responded to a question by a Congressman about the relation of § 13(c) to state law by saying that the Labor Department's proposal "is submitted on this basis . . . that the state laws must control."[37] When questioned by Congressman Wilson about whether he anticipated the "need for changes in any State laws in order to qualify any authority for funds under the provisions of the amendment", Secretary Wirtz responded:

> We are not relying upon any such changes, or assuming any such changes. *We are also assuming that the State laws would be controlling in the situation.* But, on the construction side of my answer, it is also a responsible determination in the light of experience that there would be few, if any, situations, in which the interests of a community in this program where State laws are applicable and practices applicable to collective bargaining would enter and the interests reflected in this propsed amendment could not and would not be reconciled affirmatively. It would be possible in our judgment to take care of that. (emphasis added.)[38]

In sum, as seen by the Secretary of the Department that drafted § 13(c) (as well as by the Senate Committee that

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[36] *Senate Report*, *supra* note 25, at 29.

[37] *House Hearings*, *supra* note 26, at 482.

[38] *Id.* at 486.

reported it), that section, together the UMTA funds, provided the Department with strong, flexible and discretionary power to encourage states to modify or to find ways around state laws or practices that, for example, inhibited collective bargaining. That section, in their view, clearly did not give the Secretary the power to override State law.

2. On the floor of the Senate, Senator Williams, one of the bill's chief sponsors, Senator Sparkman, the Chairman of the relevant subcommittee, and Senator Morse, a leading advocate of labor protection, all stated that § 13(c) was not intended to override state law. The reason for this unusual degree of explicitness is that two senators — Tower and Goldwater — claimed the contrary and sought to eliminate or to modify that section. Senator Tower based his claim upon the fact that the Senate Committee had struck out a proviso that would have allowed the "encouragement of collective bargaining rights to the extent not inconsistent with state laws." 109 Cong. Rec. 5322, 5415 (1963).[39] He was joined by Senator Goldwater

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[39] Senator Tower stated:

> Another matter relating to the labor section is extremely important. A number of States have, in one form or another, restrictions prohibiting certain labor activities by employees of the State and its political subdivisions. Would Federal assistance be given to States whose labor laws conflict with the labor provision in this bill? Would the labor provisions in this bill supersede the laws of the various States? The Secretary of Labor indicated there would be no superseding of State law but said the question of whether there would be an effect was a somewhat different question. However, in section 10(c)(2) of the bill, in the language referring to the enforcement of the prevention of curtailment of collective bargaining rights . . . , the words "to the extent not inconsistent with State or local law. . . .
>
> Secretary Wirtz, in referring in his testimony to the situation in Dade County — where, as I have mentioned, there was a loss of collective-bargaining rights, due to the establishment of a new transit system operated by the municipality — said that in the application of Senate bill 6 to situations of that kind:

(who also sought to strike out § 13(c)).[40] Senator Williams responded to their argument by stating:

> There would be a question that would have to be squarely faced, as to whether or not Federal funds should be used in connection with a situation of that kind, unless better arrangements could be worked out for the preservation of collective bargaining rights.
>
> Will State laws be supreseded, if not in one way, in another? The question is certainly raised as to whether the Administrator will be forced to deny assistance to certain States. Or would he deny assistance to certain States only until they changed their laws? The point is not at all clear, because no testimony was made available to the committee after the deletion of the words "not inconsistent with State or local law."

109 Cong. Rec. 5322.

[40] Senator Goldwater remarked with respect to § 13(c) (also designated as § 10(c) or § 19(c) in various bills):

> The enactment of this provision would represent a complete reversal of the public policy of the United States, which for over a quarter of a century, as enunciated in the Wagner Act and the Taft-Hartley Act, has specifically excluded by definition, any State or political subdivision thereof from all obligations imposed by the Federal Labor Management Relations Act, including the requirement to bargain collectively with representatives of its employees. Both the Wagner Act and the Taft-Hartley Act have long recognized the right of the States, local governments, and communities to regulate and manage their affairs and their arrangements with their employees free from Federal interference and control.
>
> I might say in this connection, Mr. President, that many States have laws which prevent bargaining with unions in the area of public employment. This section of the bill would preempt such laws and such ordinances as passed pertinent thereto by the local authorities.
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> • • •
>
> If this language remains in the bill, I am afraid we shall again be preempting established State laws, city ordinances, county ordinances or laws, whichever pertain.
>
> As I said a moment ago, if the local government wishes to extend the collective bargaining rights, wages, working conditions, and so forth,

> This provision [i.e. § 13(c)] is truly ancillary to the thrust of the transportation program. It is only included in the interest of fairness and equity. If as a result of the expenditure of Federal funds, a railroad employee having a lifetime of contributions to a pension system were to lose it because his railroad was taken over by the public, that would be grossly unfair. This provision protects those rights which have been hard earned and enables them to continue.
>
> *The legislative history has to be corrected, however, because if the bill shall be enacted, we must have a record that will show that the bill does not preempt State law; it does not control or dominate with irrevocable authority local situations.* The bill provides for the encouragement of collective bargaining. That does not put the force of a mandate on a community. . . . I do not believe we can pass a law which would change State law; and we do not attempt to do so. . . .

Id. at 5417. (emphasis added.)[41] Senator Sparkman added a

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with no right to strike, that is up to the local government, be it city, county or State; but if the United States moved in with the language contained in subsection (c) of section 19, it would have the effect, I believe, of preempting State law in this area.

109 Cong. Rec. 5415.

[41] Following Senator Williams' statement, this exchange ensued:

> Mr. MILLER. Is it the intention, so far as the Senator from New Jersey and the Committee are concerned, to the best of the Senator's knowledge, that the provision which is the subject of the amendment of the Senator from Arizona shall not be inconsistent with State law?
>
> Mr. WILLIAMS of New Jersey. Is that another way of saying that it cannot preempt or be a substitute for State law?
>
> Mr. MILLER. I should think so.

similar view, *id.* at 5418[42] and the effort to strike the section was defeated. *Id.* at 5420.

Mr. WILLIAMS of New Jersey. That is my answer. It was the same answer the Secretary of Labor gave to the committee.

Mr. TOWER. Mr. President, will the Senator from Arizona yield, that I may propound a further question to the Senator from New Jersey.

Mr. GOLDWATER. I yield for that purpose.

Mr. TOWER. If that is the case, why did we strike from the bill, reported by the Committee on Commerce, on page 26, line 17, the collective bargaining section : "to the extent not inconsistent with State or local law"?

If it is our intent not to be inconsistent with State or local law, why was the provision deleted?

Mr. WILLIAMS of New Jersey. The answer is very simple. The provision should not have been included in the first place. If we had not made a mistake in the first place by doing what was unnecessary, it would not have been necessary to delete that provision.

Mr. TOWER. I still do not understand the point in taking it out if, as the Senator has said, it is not the intent to be inconsistent with State law.

Mr. WILLIAMS of New Jersey. Must we, in every paragraph of every bill, say, "The action under the authority of this legislation shall be in conformity with the Constitution of the United States"?

Mr. TOWER. What reflects legislative intent more clearly than the language which was deleted from the bill?

Mr. WILLIAMS of New Jersey. I am sure the Senator knows that if one makes a mistake, he should not try to preserve it. In our legislative history, shall we magnify a mistake which we made together?

109 Cong. Rec. 5417-5418.

[42] Senator Sparkman's remarks, and the reactions of Senators Goldwater and Towers were recorded as follows:

Mr. SPARKMAN. . . . I know that the language was written. It was done clearly with the idea that while there would be an encouragement of a continuation of collective bargaining rights, it was not intended to supersede State laws. I believe the questioning of the Secretary of Labor indicates our concern about that. It was not our intention to supersede State laws, and we do not intend, I am sure, to do so. We do not believe that the language has that effect.

Mr. GOLDWATER. If we are to depend on the Secretary's testimony for legislative history, neither side has much of a leg to stand on, because

Senator Tower then sought to amend § 13(c) to require only arrangements "consistent with the laws of the State in which the project is located." *Id* at 5421. Again, he argued that without this proviso § 13(c) might override state law. The amendment was defeated, in part, because, as Senator Williams stated again and again, it was unnecessary: § 13(c) did

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this language is about as fuzzy-wuzzy as any I have ever tried to read. It reads like some of the texts on proper punctuation, because when one gets through reading it, it is just a lot of language.

Mr. TOWER. Actually, the Secretary was testifying on the basis of the language he submitted to the committee, not the language which was finally provided in the bill.

Mr. SPARKMAN. That is correct.

Mr. President, will the Senator from Arizona yield further?

Mr. GOLDWATER. I yield.

Mr. SPARKMAN. I admit that in reading the Secretary's answer, there is a chance of someone's misunderstanding it. But if the entire statement is read, I think we find that he clearly said it will not supersede State laws.

He was asked, "Does it affect them?" He replied, "That is different" — and it is. If it has any effect whatever on them, that would be covered by the word "effect." I think the Secretary was splitting hairs when he tried to make that distinction. Of course it might have an effect upon State laws, but even in that connection he repeated his statement that it will not supersede or displace or override them.

Mr. GOLDWATER. Let me read what Secretary Wirtz said, as it appears on page 313. His statement was made in answer to a question by the Senator from Texas [Mr. Tower]:

> But I should like it quite clear that think that there could be no superseding here of the State law.

But that is not a statement on which one could rely with any conviction. He merely said he thought there could be no superseding of State law. . . .

Mr. SPARKMAN. Let me point out that at another place Secretary Wirtz said "surely" this amendment would not supersede State laws.

Mr. GOLDWATER. On what page is that statement to be found?

Mr. SPARKMAN. On page 312, near the bottom.

Mr. GOLDWATER. But he added "to the best of my knowledge."

109 Cong. Rec. 5418.

not supersede state law. *Id.*[43] The real issue at stake, however, was not the question of override; the real issue was whether the Secretary of Labor would have the power to use § 13(c) as a weapon to encourage states to modify anti-union laws or to look for ways around those laws in the case of municipal transit workers (particularly those "acquired" from private companies with UMTA funds.) Senator Tower's amendment would have severely limited the Secretary's power to insist upon changes in state law as a condition for receiving funds — the very power that Secretary Wirtz had sought. The defeat of that amendment allowed him that power. Senator Javits explained the matter clearly:

> The reason I oppose the amendment is that I believe the provisions with respect to labor are in balance now, so far as Senators like myself are concerned. I should like to state my understanding of the situation and why I believe the amendment will complicate it rather than improve it.
>
> My understanding of the amendment is that the Secretary of Labor, under the bill, cannot supersede State law. If State law makes it impossible for the employees of municipal transit systems to bargain collectively, then it makes it impossible. There is nothing in the bill that can override it. Indeed, I doubt that the Constitution will permit it, and I doubt that it can be done under any phase of the Taft-Hartley law.

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[43] Senator Williams also stated:

> To provide specifically that the rights could not be inconsistent with State law would be to imply that without such language there is the possibility of the program being inconsistent with State law which we know is not the fact. If the language is put in, it seems to me, while it might seem a small matter in respect to this bill, it would set a precedent for other legislation, which I think would be dangerous.

Id. at 5423.

However, what it does, by not mentioning the proposition is to enable the Secretary of Labor . . ., to go into a State where a right-to-work law or some other law deprives the municipal employees — that is, employees of the transit system — of collective bargaining rights. Perhaps because the Administrator has money to give out, some States may be induced to make some accommodation on that score by the necessary exemption from the law or any interstate compact entered into with other States.

Therefore, we have a balanced scheme. We do not override the law; at the same time, we do not compel the Federal Government to go in where the law is adverse to the interest of labor and labor's own point of view, and perhaps also even give encouragement to exempt a situation of this kind where the State desires to get this type of Federal help.

I think that is giving something on both sides, while at the same time not giving the Administrator instructions, which is what the amendment would do, that he must go into such States, notwithstanding the fact that the municipal transit system workers might be deprived of collective bargaining rights.

Therefore, I believe the amendment should be rejected.

109 Cong. Rec. 5422 (1963).

Subsequently, Senator Morse, a strong supporter of labor protection, added that under § 13(c), "The state can continue its state policy if it wishes to; but . . . the State should not be allowed to receive Federal money with which to continue a policy that is in conflict with sound Federal policy." *Id.* at 5672. He added that the final § 13(c) provision "does not supersede any State policy." *Id.* at 5673.

Thus, the Senate debate reveals not a single senator who intended § 13(c) to override conflicting state law. It contains explicit statements by sponsoring senators that they intended the contrary and believed that § 13(c) carries out their intent. The senatorial remarks to the contrary are not supported by legal argument and were made by senators as part of an argument for an amendment that went well beyond removing any direct conflict between § 13(c) and state law.

3. The Senate debate was repeated in the House of Representatives. Some Congressmen articulated fears similar to those of Senators Tower and Goldwater. They feared that the legislation would override state law. *See, e.g.*, 110 Cong. Rec. 14979 (remarks of Rep. Taft). The bill's sponsors, however, assured the House that § 13(c) was not intended to override conflicting state law. Thus, Congressman Multer stated that "[n]othing in this bill and nothing in any amendment thus far adopted will infringe upon local law, whether it be of a State or municipality." *Id.* at 14980. And, Congressman Rains argued "that there is not one line in this bill that would vitiate in any way any State or local law. . . ." *Id.*

In sum, the legislative history reveals one explicit statement after another, made by the bills' drafters, the bill's sponsors in the Senate, and those who sponsored it in the House, that § 13(c), while designed to prod the states, is not intended to lead to the invalidation of any state law.

B

It might be argued, however, that this legislative history does not dispose of the matter because it does not explicitly consider the effect of § 13(c) on new state law enacted *after* the state has accepted UMTA funds. Indeed, the union here does not argue that § 13(c) assurances override pre-existing

state law; it claims they override subsequently enacted state law. We do not believe, however, that this distinction is determinative for the following reasons.

First, there is nothing in the legislative history of UMTA suggesting a need to draw this distinction. Rather, the history quoted above suggest that the senators and congressmen who drafted, sponsored, and voted for the bill believed that § 13(c) would not override *any* state law. And, there is no indication at all that both the statute *and* the detailed assurances given pursuant to § 13(c) were intended to predominate in case of conflict.

Second, if as the Transit Union contends, § 13(c) assurances override state law, Congress, in enacting § 13(c), to a significant extent federalized collective bargaining with local transit unions. Section 13(c) assurances consist of detailed documents, negotiated between transit authority and union, containing hosts of conditions related to wages, hours and working conditions — conditions that could govern the relations between the parties for years to come. To give these documents the authority of federal law overriding state law to the contrary would transfer predominate legal authority for local transit labor relations from state to federal government. The statute would have created a federal involvement in local transit labor relations akin to that which now exists with respect to railroad and airline workers. *See generally International Association of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 687 (1963).

Whether or not such a federal presence is desirable, we cannot interpret the ambiguous language of § 13(c) to create it without a fairly clear indication that such was Congress's intent. Unlike railway and airline workers, we are here considering workers for *local* transit companies whose employers, by and large, are municipalities or state governments. *Cf. National League of Cities* v. *Usery, supra*. Moreover, in the Na-

tional Labor Relations Act Congress explicitly exempted public employees, such as MBTA workers, from federal labor legislation. *See Local Division 589, Amalgamated Transit Union v. Amalgamated Transit Union*, 295 F. Supp. 630, 632 (D. Mass. 1969). Had Congress intended to grant the Secretary of Labor NLRB-type (or more) power to override state law governing these local public employees, one would expect to find some indication that Congress at least thought about the matter. But instead, the legislative history is silent. Not a word indicates that Congress intended such a result. The unions in 1963 urged no such outcome.[44]

To the contrary, the legislative history suggests that Congress was sensitive to the local nature of local transit; it "expected that specific conditions [in § 13(c) assurances] normally will be the product of local bargaining and negotiations;" *Senate Report, supra* note 25, at 28; *see House Report, supra* note 25, [1964] U.S. Code Cong. & Admin. News at 2584-2585;[45]

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[44] Indeed, the prime concern advanced by labor leaders with respect to § 13(c) was that while they agreed with its objectives, it was excessively general. Thus, they proposed a more detailed amendment, which provided, in part, that fair and equitable arrangements "shall be available to all . . . employees and shall not be limited to employees of existing mass transportation systems but shall "include employees employed on any new project, system, line, operation, or facilities. . . ." *House Hearings, supra* note 26, at 494-495 (statement of Andrew J. Bielmiller). In particular, they pressed that a provision be added which would authorize binding arbitration, *id.*, a proposal which was rejected by Congress.

[45] We note, moreover, that the U.S. Department of Labor has recognized the validity of state law in its implementing regulations. 29 C.F.R. § 215.3(a)(2)(1980) provides:

> In instances where state or political subdivisions are subject to legal restrictions on bargaining with employee organizations, the Department of Labor will utilize special procedures to satisfy the Federal statute in a manner which does not contravene state or local law. For example, employee protective terms and conditions, acceptable to both employee and applicant representatives, may be incorporated into a resolution adopted by the involved local government.

and its members made the many statements previously discussed suggesting the legal supremacy of state law.

Third, § 13(c)'s framers intended a limited set of provisional protections. Secretary Wirtz testified that "we are concerned particularly only about the *transitional* effects upon particular employee groups . . . [caused by] consolidation, merger, acquisition of various lines or the establishment of new systems beside or in some cases replacing old systems [or by the] establishment of programs of technological improvement." *Senate Hearings, supra* note 25, at 308 (emphasis added.) To erect upon § 13(c) assurances a near permanent set of specific collective bargaining conditions which the state cannot change is to go beyond this limited purpose.

Fourth, to find that specific § 13(c) assurances override state law would also go beyond § 13(c)'s objective of assuring "fair and equitable" arrangements. Clearly, a state law could modify a particular § 13(c) assurance without inevitably bringing about an unfair or inequitable result. It has not been shown, for example, that the new system provided by Chapters 405 and 581 is basically unfair or inequitable; it is simply claimed that those chapters change the 1973 Basic Agreement permanently frozen in detail by the 1974 assurances. Congress's general intent to secure fair arrangements does not require the implementation of any *particular* set of detailed provisions. Indeed, if the specific detailed provisions of a § 13(c) assurance prevail over *any* conflicting change in state law, the Secretary of Labor would lose any ongoing power to exercise discretion — to decide whether or not a change makes the state system as a whole unfair to the transit workers. This result would be anomalous given a legislative history stressing the need for flexibility and discretion . *See* note 34. *See also Kendler* v. *Wirtz*, 388 F.2d 381, 383 (3rd Cir. 1968); *City of Macon* v. *Marshall*, 439 F. Supp. 1209, 1223-1224 (M.D. Ga 1977).

Fifth, § 13(c) assurances need not override state law to make § 13(c) enforceable. The threat of receiving no further UMTA funds would often prevent a state currently receiving those funds from changing its laws contrary to the policy of § 13(c). If not, the Secretary might halt the flow of funds or take other appropriate action. In any event, such an enforcement scheme is more consistent with Congressional intent than the alternative urged upon us by the Transit Union; namely, that § 13(c) permanently binds states ot the details of § 13(c) assurances and referenced collective bargaining agreements entered into perhaps a decade earlier, regardless of whether changes in state law are, in any overall sense, unfair. Even if such a system is desirable, the legislative history of UMTA suggests that Congress did not intend to create it.

C

The Transit Union has cited several cases that it believes stand for the proposition that § 13(c) assurances supersede state law. We have found no case, however, which is both directly on point and which considers the issue in detail. The Union cites many cases which deal with *other* federal statutes. These include *International Association of Machinists* v. *Central Airlines, Inc.*, 372 U.S. at 689-91 (§ 204 of the Railway Act, 45 U.S.C. § 184); *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275, 291-294 (1958) (Reclamation Act of 1902); *International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, 297-297 (1959) (§§ 7 and 8 of the National Labor Relations Act, 29 U.S.C §§ 157 and 158); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456-457 (1957) and *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95, 102-103 (1962) (substantive law to be applied in suits under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 184). In each of these

cases, the Court held that federal law is preemptive. Yet, these cases are not persuasive here where we deal with a different statute, with different statutory objectives, and with a different legislative history.

Most of the UMTA cases cited by the Union do not deal with the precise question here at issue. Thus, in *Local Division 714, Amalgamated Transit Union, AFL-CIO* v. *Greater Portland Transit District*, 589 F.2d 1 (1st Cir. 1978) we decided a jurisdictional question. We held only that a union "does have a federal cause of action, implied from UMTA § 13(c), to enforce the labor protective arrangements to which the [Greater Portland Transit] District agreed to as a condition of federal financial assistance under the Act." 589 F.2d at 16. We further noted that future "enforcement litigation will surely involve interpreting the protective arrangements in light of the purposes and policies of § 13(c), as well as resolving issues relating to the interplay between federal and state labor policies and possible supremacy clause problems." *Id.* at 13. We did not decide the question of whether § 13(c) requires that state law be subordinated to § 13(c) assurances. The Transit Union has cited language in that case that might imply such subordination. To the extent that it does so, however, we hereby disapprove it.

Several other cases cited also deal with the same jurisdictional question at issue in *Greater Portland*. Thus, the Sixth Circuit, *Local Division 1285, Amalgamated Transit Union* v. *Jackson Transit Authority*, 650 F.2d 1379 (6th Cir. 1981); the Seventh Circuit, *Local Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utitlity*, 585 F. 2d 1340 (7th Cir. 1978); and the Eighth Circuit, *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority*, 582 F.2d 444 (8th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979), also reached the conclusion that a claim of breach of a § 13(c) agreement sets forth a dispute cognizable

in federal court;[46] in none of these cases did the court explicitly explore the problem of a conflict with a state law, and in none did the court decide whether, as a matter of general principle, assurances provided under § 13(c) govern in the face of a conflicting state statute.

We recognize that there are dicta in *Jackson* and *Kansas City Area Transportation Authority* which appear to support the Transit Union's position.[47] And, subsequent to the deci-

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[46] Similarly, *see Division 1235, Amalgamated Transit* v. *Metropolitan Transit Authority*, 650 F.2d 1389 (6th Cir. 1981); *Division 1212, Amalgamated Transit Union* v. *Chattanooga Area Regional Transportation Authority*, 483 F. Supp. 37, 39 (E.D. Tenn. 1979).

[47] In *Jackson, supra*, the Sixth Circuit stated:

> It is undisputable that Section 13(c) reflects national labor policy. See 109 Cong. Rec. 5670. Indeed, the legislative history reveals that several senators were concerned about possible conflicts between Section 13(c) and state law, particularly in the area of the right to strike. *Id.* at 5672-73. Senator Morse, the chief sponsor of the bill which became Section 13(c), assured his colleagues that state laws forbidding public employee strikes would supersede national labor policy, but *only* where the right to strike was concerned; *all other* collective bargaining rights would be protected. *Id.* at 5671-73. . . .
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> Jackson points out, correctly, that Section 13(c) was designed to encourage flexibility in formulating labor protective "arrangements." Senator Morse himself suggested that if local law prohibits collective bargaining by municipal employees, alternative solutions such as entrusting management of the transit authority to a private commission which *could* legally bargain with the union might be explored. *See also* Department of Labor Guidelines, 43 F.R. 13558 (3-31-78). The point, of course, is not that Congress was willing to make allowances for local problems. Rather, the point is that to qualify for federal funds, municipalities *must*, one way or another, undertake to protect the collective bargaining rights required by national labor policy.

650 F.2d at 1385-1386.

In a similar vein, the Eight Circuit has stated:

> We recognize that under the laws of some states employees of public agencies are not accorded collective bargaining rights nor do they enjoy

sion of the Eighth Circuit, a district court ruled, in an alternative holding, that where state law and a § 13(c) agreement are in conflict, state law must yield. *Division 1287* v. *Kansas City Area Transportation Authority*, 485 F. Supp. 856, 863-864 (W.D. Mo. 1980). *But see generally Division 580, Amalgamated Transit Union* v. *Central New York Regional Transportation Authority*, 556 F.2d 659, 662 (2d Cir. 1977) (suggestive of support for proposition that state law need not yield when in conflict with § 13(c) agreement). Several unpublished opinions also lend support to the Transit Union's position. None of these opinions, however, consider the issue in depth, and we have determined not to follow them.

For these reasons, we hold that the specific detailed assurances given by a union and a transit authority to the Labor Department under (UMTA) § 13(c) do not invalidate a state law to the contrary.

III

The Transit Union also claims that Chapters 405 and 581 are unconstitutional because they impair the obligations of the 1973 Basic Agreement, thereby violating the Contract Clause of the United States Constitution. ("No State shall . . . pass

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the benefits of such bargaining, including arbitration. We think, however, that when a state or a combination of states forms a public transit agency for the express purpose of obtaining federal money to enable it to take over the business of a private transit company, and where the agency in order to obtain the money enters into a § 13(c) agreement that calls for interest arbitration, the obligation to arbitrate is binding on the agency, regardless of general state law or policy.

Because the opinions do not explore the precise nature of the conflict between state statutes and federal assurances, we are uncertain of the extent to which their language directly conflicts with our holding here.

any . . . law impairing the Obligation of Contracts . . . ." Art. I., § 10.) The MBTA disputes the district court's holding that portions of Chapter 405 and all of Chapter 581 violate the Contract Clause. We agree with the MBTA that these chapters do not violate the Clause.

For one thing, the Basic Agreement may well have expired before Chapters 405 and 581 took effect. Although language in the Agreement appears to extend it indefinitely into the future, a Massachusetts state court recently held that, at least for purposes of injunctive relief, the agreement has terminated. On January 7, 1981, the Massachusetts Superior Court, per Judge Young, stated that the Transit Union contract (among others) contains:

> language implying that the prior contract provisions remain in effect until a new contract is negotiated. For injunctive purposes, this Court concludes that it is unreasonable to interpret these provisions so as to continue the prior provisions forever. . . . Accordingly, for purposes of granting injunctive relief, this Court shall set a six month period to injunctive relief granted on the basis of such contracts since this seems a reasonable time within which the parties may renegotiate them.

Gallahue v. *MBTA*, Mass. Superior Court, Suffolk County No. 45917, slip op. at n.1 (January 7, 1981).[48] On July 1, 1981, Judge Young denied plaintiffs' motion to extend the injunction, presumably on the ground that the collective bargaining contract was no longer in effect. If Judge Young's opinion constitutes an authoritative interpretation of the Basic Agreement, the Contract Clause would not be violated, for

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[48] *See* note 21 *supra*.

Chapters 405 and 581 apply only to future negotiations,[49] when the Basic Agreement would no longer be in effect. It has been clear since 1827 that the Clause applies only to laws with retrospective, not prospective, effect. *Ogden* v. *Saunders*, 12 Wheat. 213 (1827). *See also* Schwartz, *Old Wine in Old Bottles: The Renaissance of the Contract Clause*, [1979] *Supreme Court Rev*, 95, 99.

For another thing, even if the Superior Court's decision is not to be taken as a definitive state interpretation of the Basic Agreement, there are strong reasons for believing that the Agreement should be given this interpretation for purposes of applying the federal contract clause. Ever since the *Charles River Bridge* case, it has been the law that public contracts are to be strictly construed in favor of the state. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420 (1837); Schwartz, *supra*, at 99. In holding that a company's charter to operate a toll bridge did not bar the state from authorizing the construction of a competing free bridge, the Supreme Court stated: "'[A]ny ambiguity in the terms of the contract must operate against the [company] . . . and in favor of the public'." 11 Pet. at 543, *quoting Stourbridge Canal* v. *Wheely*, 2 B & Ad. 793. Similarly, the Court has written:

> Every reasonable doubt is to be resolved adversely [to the private party claiming under the contract]. Nothing is to

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[49] Defendants have stated that the laws here at issue are designed to apply to MBTA contract negotiations subsequent to their enactment.

The federal district court also suggests in its supplementary memorandum of May 15, 1981, that the Contract Clause problem may no longer exist because the Commonwealth had asserted on May 13, 1981, "that the parties have agreed to terminate the 1973 agreement and write a new one." As the court goes on to note, however, the record is unclear on this point — and the Transit Union has asserted in this court that as far as it is concerned, the collective bargaining agreement remains in effect.

> be taken as conceded but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation and doubt is fatal to the claim. This doctrine is vital to the public welfare.

Fertilizing Co. v. *Hyde Park*, 97 U.S. 659, 666 (1878). This doctrine illustrates the deference that federal courts must pay to state legislation if the Contract Clause is not to become a serious obstacle to the enactment of social or economic legislation that the states believe is necessary.

It is possible to interpret the terms of the Basic Agreement in a way that suggests the Agreement has terminated. Of course, if taken literally, the language of the Agreement would make it perpetual. Sections 600 and 601 of the 1973 Basic Agreement were amended by the Memorandum of Understanding (the 1979 collective bargaining agreement)[50] to provide that the Agreement will continue in force until December 31, 1980, "and from year to year thereafter unless changed by the parties." A party desiring change shall give notice, and if no agreement is reached on those proposals, "the parties shall submit the disupted issues to final and binding arbitration as provided for in this Agreement." This language literally requires perpetual use of the 1973 arbitration system. It would prevent either party from *ever* denouncing the Agreement through termination and seeking a totally new one, no matter how unsatisfactory it found the 1973 arrangement.

It is difficult to believe that the parties to the agreement thought they could bind their successors forever. Perpetual contracts would seem to be particularly inappropriate in the field of labor relations, where fluctuating economic circum-

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[50] *See* note 4 *supra*.

stances ordinarily call for the ability to adapt to changes.[51] *See generally* D. Bok and J. Dunlop. Labor and the American Community 289 (1970) (unpredictable nature of long-term agreements). And, it seems unlikely that the parties in 1973 or 1979 believed that they had found a permanent solution to the MBTA's labor/management problems or that they thought they had prevented both the state and the Transit Union from ever again exercising their respective powers to achieve some other accommodation with changing realities. The parties were presumably aware that a perpetual agreement was unlikely to be enforceable at law. Not even in the area of property law — an area where legal relationships are traditionally stable and certain, have the courts allowed private parties to make arrangements lasting in perpetuity. *See* Restatement of the Law of Property § 370 (1944). State courts have interpreted commercial contracts that apparently called for perpetual arrangements, not to do so. *See Simons* v. *American Dry Ginger Ale Co., Inc.*, 335 Mass. 521, 524, 140 N.E. 2d 649-665 (1957). And, where such an interpretation has proved impossible in public collective bargaining agreements, they have struck such provisions down as contrary to public policy. *See, e.g., Niagara Wheatfield Administrators Association* v. *Niagara Wheatfield Central School District*, 389 N.Y.S. 2d 667, 669-670 (4th Dept. 1976). Massachusetts courts have recognized the particularly strong public interest at state where government labor contracts are at issue; and, they have indicated their willingness to strike down or interpret away provisions in such contracts that run contrary to public policy, by, for example, imposing under restrictions upon the freedom of action of public authorities. *See School Committee of Boston*

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[51] Indeed, other "public employees" on Massachusetts are limited to collective bargaining agreements for a term not to exceed three years. Mass. Gen. Laws Ann. ch. 150E, § 7 (cum. supp. 1981).

v. *Boston Teachers Union*, Mass. , , 389 N.E. 2d 970, 973-974 (1979); *Watertown Firefighters* v. *Watertown*, Mass. , , 383 N.E. 2d 494, 498 n.15 (1978).

Under these circumstances, the fact that the Basic Agreement is silent as to the parties' authority to terminate completely or to denounce the contract (as contrasted with the power to "change" the contract) might well be interpreted to allow them to do so. Consistent with the express language, the interest arbitration provision might be interpreted as forbidding total termination of the contract only *for a reasonable time* after expiration of the contract's express term — in this instance December 31, 1980. Under any such interpretation of the contract — similar to that apparently reached by the Massachusetts Superior Court — there is no contract clause problem present here.

Nonetheless, it is conceivable that state courts reviewing the Basic Agreement in related cases will reach a different conclusion. Because of the need for expeditious resolution of this litigation, we have also considered the Contract Clause question on the assumption that the "perpetual duration" provisions of the Agreement are to be read literally. In that case, the narrow question before us is whether two subsequently enacted state laws (Chapters 405 and 581) can constitutionally override those provisions of the contract that provide for indefinite (or perpetual) extension (or renewal) of the contract's terms. We believe that they can.

The Contract Clause does not make unlawful *every* state law that conflicts with *any* contract that contains terms contrary to its provisions. Any such interpretation would make of the clause an insuperable barrier to necessary state legislation. It would threaten to make the Constitution unworkable. *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 428,

434-435, 443 (1934).[52] As the Supreme Court has stated, "literalism of the construction of the contract clause . . . would make it destructive of the public interest by depriving the state of its prerogative of self-protection." *W.B. Worthen Co.* v. *Thomas*, 292 U.S. 426, 433 (1934). Thus, the courts have interpreted the clause so as to harmonize the state's need to legislate in the interests of its citizens with the need to protect investors and other contracting parties against repudiation of a debt or obligation. In doing so, at least since the early 1930's, they have struck down state laws only infrequently.[53]

In applying the clause, courts have examined the strength of the relevant interests of the private parties and those of the state. They have considered the nature of the private party's investment, which could take the form of labor as well as capital: to what extent has a party *worsened his pre-existing circumstances* by entering into, and relying upon, the contract? Moreover, the courts have examined the extent to which the party might reasonably have relied upon enforcement of the contractual promise in order to protect his investment. Thus, it is not surprising that the courts have upheld laws where these interests are likely to be weak, such as where a law would have basically prospective application, *Ogden* v. *Saunders*, *supra*, or where a retrospective law would modify, not substantive rights, but pre-existing contractual remedies. *Penniman's Case*, 103 U.S. 714 (1881). *See Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 60 (1935); *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. at 434 n.13 (collecting "remedy" cases);

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[52] *See generally* Comment, *Revival of the Contract Clause: Allied Structural Steel Co.* v. *Spannaus and United States Trust Co.* v. *New Jersey*, 65 Va. L. Rev. 377, 381-385 (1979).

[53] Until very recently, some commentators considered the clause a "dead letter". *See* G. Gunther, Cases and Materials on Constitutional Law 554 (10th ed. 1980); Schwartz, *supra* at 95-96.

Mason v. *Haile*, 12 Wheat. 370 (1927). *See also Sturgis* v. *Crowninshield*, 12 Wheat. 122, 200, 201 (1819). As the Supreme Court recently stated, "a reasonable modification of statute governing contract remedies is much less likely to upset expectations than a law adjusting the express terms of an agreement." *United States Trust Co.* v. *New Jersey*, 432 U.S. 1, 20-21 n.17 (1977).

Courts have also examined the type of legislation at issue to determine the importance and strength of the state's interest in legislating. *See, e.g., Stone* v. *Mississippi*, 101 U.S. 814, 817-818 (1880). They have frequently held that contracts are impliedly limited by, and subject to, the implicit authority of the state to exercise its "police power". *E.G., Allied Structural Steel* v. *Spannaus*, 438 U.S. 234, 241 (1978); *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S at 435-436; *Stone* v. *Mississippi*, 101 U.S. at 817. And, the Supreme Court has defined "police power" for Contract Clause purposes, "as an exercise of the sovereign right of the Government to protect the lives, health, morals, comforts, and general welfare of the people . . . ." *Manigault* v. *Springs*, 199 U.S. 473, 480 (1905). The state's "paramount authority . . . is not limited to health, morals and safety. It extends to economic needs as well." *Veix* v. *Sixth Ward Ass'n*, 310 U.S. 32, 39 (1940). This doctrine reflects the importance of allowing states to legislate freely on social and economic matters of importance to their citizens, modifying the law to meet changing needs and conditions.

Following this doctrine, and of direct relevance here, the Supreme Court has upheld state laws that invalidated prior contractual obligations in the field of transportation; *see, e.g., New Orleans Pub. Serv.* v. *New Orleans*, 281 U.S. 682 (1930); *Denver & R.G.R. Co.* v. *Denver*, 250 U.S. 241 (1919); *Atlantic Coast Line R. Co.* v. *Goldsboro*, 232 U.S. 548, 558 (1941); *Northern Pac. R. Co.* v. *Duluth*, 208 U.S. 583 (1908); and, it has upheld newly enacted state labor laws that specifically set

aside previously existing contracts to the contrary. *See, e.g., American Federation of Labor* v. *American Sash Co.*, 335 U.S. 538, 540 (1949); *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 531-32 (1949).

An examination of the relevant interest in this case suggests those of the Transit Union are weak and those of the Commonwealth of Massachusetts correspondingly strong. For one thing, the Transit Union could not *reasonably* have relied upon the continued enforcement of the arbitration provision in the Basic Agreement as necessary protection for the investment of labor by its members. The very uncertainty as to the legality under state law of a contractual arrangement purporting to be perpetual would make reliance upon its lasting unreasonable. *See* p. 44 *supra*. Moreover, the contractual provisions at issue here are concerned with the form of the arbitral process and the procedure for determining wages, hours and working conditions; the provisions themselves do not set those terms.[54] They are thus procedural and therefore more akin to a contractual remedy than a contractual right. The Transit Union and its members cannot easily say what terms will result from the new procedure; or how those terms will differ from those that the prior procedure would have provided. They may fear the new procedure will lead to less favorable substantive terms; but so may creditors have feared that changes in contractual remedies (*e.g.* abolition of imprisonment for debt) would make it harder to collect their debts. Yet due to the diminished nature of the reliance involved, such procedural changes in remedy have long been allowed. *See* cases cited at p.47, *supra*. Further this is not a case of investment given to the state with the expectation of the state returning it, securing its return, or returning an equivalent value through the en-

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[54] And, the procedure was itself subject to change through use of the arbitration system.

forcement at issue. The Transit Union's members have received the pay and working conditions they bargained for and in return for which they gave their labor. It is difficult to see how the promise that a particular arbitration procedure would be used indefinitely into the future — beyond the life of the express terms of the existing agreement — could have played more than a small role in an employee's decision to work for the MBTA. Finally, the Commonwealth, as far as possible, has sought to protect reasonable reliance and expections by applying the laws at issue here only to future negotiations, when contracts expire subsequent to the enactment of those laws.[55]

For another thing, the state's interest in legislating in this area seems sufficiently strong to overcome the prior contract's restraints. Public transportation is vital to the state and to its economy. The difficulties of finding satisfactory methods for resolving labor disputes — particularly in the field of public employment — are well known. D. Bok & J. Dunlop, *supra* at 228 *et seq*. The state plausibly claims that the problems of cost and efficiency are great. One piece of legislation at issue here (Chapter 405) was enacted after a long impasse in bargaining, and the other (Chapter 581) was enacted during a period of fiscal emergency as part of a government effort to keep the system from closing down. The state's interests here would seem at least as great as those present in other cases where the Supreme Court upheld a state law's validity. *See, e.g., Stone* v. *Mississippi, supra* (state forbids lottery despite its

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[55] By contrast, in *Subway-Surface Supervisors Ass'n* v. *New York Transit Authority*, 44 N.Y. 2d 101, 375 N.E. 2d 384, 404 N.Y.S. 2d 323 (1978) and in *Sonoma County Organization of Public Employees* v. *County of Sonoma*, 23 Cal. 3d 296, 152 Cal Rptr. 903, 591 P.2d 1 (1979), the challenged legislation applied to the financial terms of existing contracts. In the former case, the legislation was upheld as "a necessary and appropriate" measure in a time of emergency. 44 N.Y. 2d at 113, 375 N.E.2d at 390, 404 N.Y.S. 2d at 329. In the latter case, the court struck down the statute, finding, *inter alia*, that no "emergency" existed.

grant of a twenty-five year lottery franchise to a firm three years earlier); *Faitoute Iron & Steel Co.* v. *City of Asbury Park*, 316 U.S. 502 (1942) (state law altered a municipal bond contract); *El Paso* v. *Simmons*, 379 U.S. 491 (1965) (state law modified a land-sale contract by reducing redemption period); *Fertilizing Co.* v. *Hyde Park*, *supra* (state law rendered company charter valueless); *Atlantic Coast Line R. Co.* v. *Goldsboro*, *supra* (state law restricted railway's contractually granted right to operate).

Moreover, it should be kept in mind that the state laws before us interfere with a prior contractual promise only to the extent that the promise would seek to prevent the state from *ever* changing the arbitration system. In other words, the narrow issue we are considering is whether the state can override a promise by one of its authorities made several years before that ties the hands of all future legislatures in an area of great importance to the public, concerning serious problems (labor/-wage/cost/efficiency negotiations) wher few would claim to have found even a provisionally satisfactory answer, let alone a permanent one. The Supreme Court has written that "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." *United States Trust Co.* v. *New Jersey*, 431 U.S. at 23. We do not believe that the Contract Clause grants the MBTA authority to restrict so significantly the power of future state legislatures.[56]

The Transit Union has pointed out, however, that recently the Supreme Court, in *United States Trust Co.* v. *New Jersey*

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[56] *Cf. School Committee of Boston* v. *Boston Teachers Union*, 389 N.E.2d at 973: "Public policy . . . may limit the ability of a public employer . . . to bind itself to a given contractual provision or to delegate to an arbitrator the power to bind it."; *City of Taunton* v. *Taunton Branch of Mass. Police Ass'n*, 406 N.E.2d 1298, 1302 (Mass. App. Ct. 1980) (legislative wariness of imposing arbitration).

wrote that a state law impairing the state's prior contractual obligation is valid only if "it is reasonable and necessary to serve an important public purpose." 431 U.S. at 25. *See also Allied Structural Steel* v. *Spannaus*, 438 U.S. at 243-244, 247. The Union argues that Chapters 405 and 581 are not "reasonable and necessary" because there are other methods available — fare increases for example, that will resolve the MBTA's financial problems. The issue that the Union's claim puts before us is the extent to which we are to defer to the state legislature's judgment on these matters.

If we judge the legislature's actions "in the light of the facts made known or generally assumed", *cf. United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 (1937), those actions are supportable. The legislature clearly felt that Chapters 405 and 581 represented a necessary response to the problems before it. We cannot disagree. The record here reveals the seriousness of the problems facing the MBTA and the alternatives that had been tried. We are aware, as the Supreme Judicial Court has pointed out, that the financial crises which beset the MBTA in late 1980 "threatened the availability of essential services of transportation to such an extent as to endanger the health, safety and welfare of the community." *MBTA Advisory Board* v. *MBTA*, Mass. Adv. Sh. (1981) 403, 407. The complex controversies revealed by the conflicting affidavits filed in the district court themselves, suggest that there is no "obvious" alternative to the legislature's approach. Thus, even without engaging in the normal presumptions favoring state legislation, *cf. Morse* v. *Boston*, 253 Mass. 247, 252, 148 N.E. 813, 815 (1925), we would conclude that a legislative judgment that these statutes are both reasonable and necessary is itself a reasonable judgment.

We do not believe that *United States Trust* requires the federal courts to go further to reexamine *de novo* all the factors underlying the legislation and to make a totally independent

determination about whether a fare increase or some other alternative would have constituted a "better" statutory solution. It is true that language in *United States Trust* suggests moderately close court scrutiny of legislation that conflicts with prior *public* contracts. To be specific, the Court stated that as to *private* contracts, "in reviewing economic and social regulation . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure. . . ." 431 U.S. at 22, 23. But, as to public contracts, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate. . . ." 431 U.S. at 26. This language itself, however, refers only to the need to avoid "complete" deference, and it is to be contrasted with the dissent's claim that in Contract Clause cases there should be "unusual" deference to the lawmaking authority of state governments. 431 U.S. at 46 (Brennan, J., dissenting). The very existence, and nature, of the complex factual controversies revealed in the record before us here support the legislature's judgment even without "complete" deference.

More importantly, *United States Trust* limits its stricter "review" approach to state laws in the "financial" area — laws which impair a state's "financial obligations." Indeed, it characterized the promise before it as "purely financial." 431 U.S. at 25. And, it specifically distinguished "as a threshold matter" state actions in other areas which might "fall within the reserved powers that cannot be contracted away." 431 U.S. at 24-25. In interpreting this language, we note that the *United States Trust* facts presented a paradigm of the type of protection that the Contract Clause was designed to offer — a protection given to those who invested money, time and effort against loss of their investment through explicit repudiation. *See* B. Wright, *The Contract Clause of the Constitution* 15-16 (1938); Hale, *The Supreme Court and the Contract Clause*, 57 Harv. L. Rev. 512 (1944). Unlike that case, there is no evi-

dence here of any unreasonable effort to impose the costs or burdens of a new legislative policy upon a small group of previous investors, by, for example, depriving them of their investment. There is no reason to examine these provisions under the strict standard applied when rights specifically protected by the Bill of Rights or minority rights protected by the fourteenth amendment are at stake. *See Dandridge* v. *Williams*, 397 U.S. 471, 484 (1970).

Finally, it would be unusually difficult for a federal court to conduct a trial and determine *de novo* the reasonableness and necessity of each detailed provision of these statutes. The difficulties are well illustrated by the affidavits that the parties have submitted. The MBTA, for example, claims that salaries of MBTA workers in every job category are significantly higher than those of Massachusetts state and municipal workers doing comparable work (*e.g.*, MBTA clerk/typists and janitors earn 92 percent more than comparable state employees; machinists earn 84 percent more than comparable state employees; in 1979, two carshifters, one surface operator, one trackman, and one portable compressor operator each earned over $40,000, of which over $20,000 was overtime pay); that the average MBTA employee earns 79 percent more than the average manufacturing industry worker in Massachusetts; that the MBTA's cost per mile is 83 percent higher than the next most inefficient system; that the MBTA lacks flexibility to adjust job assignments or reclassify employees to meet changing needs; that "featherbedding" is rampant; that the MBTA is required to pay overtime rates to an employee during any day he works more than eight hours, even if he does not work more than forty hours that week; that restrictive work rules require the MBTA to hire full-time people for part-time jobs; and that the MBTA is unable unilaterally to subcontract out work. The MBTA also claims that its efforts to deal with these problems through the established collective bargaining arbitration pro-

cedures have proven unsuccessful; and, according to a former chairman, changes in work practices could obviate the need for a fare increase.

The Transit Union strongly denies these allegations. Its affidavits set forth contrary claims. It claims, for example, that the MBTA has not been unsuccessful under existing interest arbitration; that the MBTA has failed to use the bargaining and arbitration processes properly to deal with its problems, that the financial dependence by the MBTA upon tax revenues is largely a result of inadequate farebox revenues; that union work practices are not inflexible; that the MBTA work force is efficient; that the MBTA has been able to subcontract out work; and that the MBTA enjoys above average productivity from its workers.

The district court was able to make a few findings about work rules insofar as the parties could agree about the facts.[57]

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[57] In its supplementary memorandum of May 15, 1981, the district court stated:

> . . . There appears to be no dispute . . . about the existence of the following work rules for whatever significance they may have:
>
> a. Management may not make temporary reassignments of employee to jobs at locations different from their regular assignment.
> b. Employees may not be temporarily reclassified to meet unexpected needs.
> c. Rapid transit vehicles within a storage yard must be moved by a yard motorman and may not be moved by the regular operators of the vehicles even if there are not enough yard motormen on duty at a particular time. The yard motormen do not do any other work.
> d. Employees may not be assigned to two "details".
> e. Overtime is paid on the basis of an eight-hour day rather than a 40-hour week, and in any case must first be offered to senior employees on a system-wide basis. An employee may receive overtime without having worked a full 40-hour week.
> f. There is system-wide bidding for jobs on the basis of seniority.

But to go further and resolve disagreements, the court might well have to pass judgment upon such matters as a proper rate of pay, the way differently constituted arbitration tribunals are likely to function, the ease, as a political matter, of raising taxes or fares, the likely social and economic effects of a fare increase, the pressures (social and economic) that could lead to serious labor unrest, and so on. Answering these sorts of questions, and thereby determining the "reasonableness and necessity" of a particular statute, is a task far better suited to legislators than to judges. Thus, in the case before us, where economic or social legislation is at issue, some deference to the legislature's judgment is surely called for.

In sum, given the small amount of reliance that the Transit Union could reasonably have placed upon the perpetual continuation of the Basic Agreement, the importance of preserving the state's power to legislate in this area, the apparent reasonableness and necessity of the legislation, and the state's efforts to apply the statutes prospectively, thereby minimizing their interference with the parties' reasonable expectations, we hold that Chapters 405 and 581 do not violate the Contract Clause even if, as a matter of state law, the Basic Agreement is still in effect.

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g. Motormen must be assigned to rail maintenance vehicles, but do not operate the vehicle or participate in maintenance.

h. Schedules once assigned may not be changed to meet shifting rider demands, except on a three-month basis.

i. Penalties must be paid to drivers on split runs if the break exceeds two hours. MBTA pays $2.6 million per year in such penalties.

j. There are restrictions on the hiring of part-time drivers.

I make no findings with respect to the effect of the foregoing work rules, or the justification for them, concerning which I have not heard evidence or argument. Furthermore, I express no opinion as to the relevance of any of the above work rules to any issue before me or before the Court of Appeals.

IV

We now turn to the different claim of the other appellee in this case, Lodge 264 of District 38, International Association of Machinists and Aerospace Workers (the "Machinists"). On July 1, 1976, the Machinists and the MBTA entered into their most recent collective bargaining agreement. Article II provided:

> The term of this Agreement shall commence as of January 1, 1976, and shall extend to and include December 31, 1977, and from year to year thereafter, unless either party shall give to the other party a notice . . . of a desire to change or terminate this Agreement.
>
> After receipt of such notice, the Amendment shall be opened up and the change or changes desired by either or both parties shall be considered.

Article XIV(A) provided:

> No Layoff — No employee, in any classification under the jurisdiction of the Association [the Machinists' Union], shall be laid off during the term of this Agreement.

On October 19, 1977, Charles E. Deignan, Business Representative of the Machinists, wrote the MBTA, stating "Notification is given that the undersigned hereby wishes to re-open the Agreement . . . ." On October 26, 1977, Robert R. Kiley, Chairman of the MBTA, wrote to Mr. Deignan that "the Authority hereby gives notice that it desires to make changes in the aforesaid Articles of Agreement, as amended." In the

following months, the MBTA and the Machinists apparently negotiated, but they reached an impasse in July 1980. Though the Agreement also provided for interest arbitration, they could not agree, in light of Chapters 405 and 581, what form that arbitration should take.

Until March 2, 1981, the MBTA was prevented from making significant changes in the status quo by the state court injunction referred to at page 15 note 21, and page 41 *supra*. On March 3, 1981, however, the MBTA notified the Machinists that it intended to lay off fifty-three employees represented by that union, effective March 21, 1981.

The Machinists then intervened as a plaintiff in this action initiated by the Transit Union. The Machinists claimed protection under the 1974 § 13(c) agreement.[58] They joined the Transit Union in its Supremacy Clause and Contract Clause contentions. And they claimed that, in any event, as a matter of state law, their collective bargaining contract was still in effect and Article XIV of that contract prohibited layoffs.

The district court enjoined the layoff of the Machinists on the basis of state law. It reasoned that the Machinists' contract had, in fact, expired on December 31, 1977, and that the exchange of notices given in October 1977 had operated under the terms of the contract "to cut off the 'year to year' extended term." 511 F. Supp. at 316. However, because it appeared from an "uncontradicted affidavit" submitted by the Machinists that "the parties have treated the agreement as continuing

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[58] The MBTA contends that while the International Association of Machinists and Aerospace Workers signed the § 13(c) agreement, it did so in its capacity as an organization representing Boston and Maine Railroad employees, not MBTA employees. (Affidavit of Paul J. Murphy, April 29, 1981). In November 1980, the attorney for the Machinists was informed of the MBTA's position that since Lodge 264 was not a signatory to the existing § 13(c) agreement, it could not invoke the protections of that agreement. This issue has not been briefed by any of the parties, and it is not necessary that we decide the matter here.

in force up to this time, and have mutually enforced its terms as from time to time amended," 511 F. Supp. at 316-317, the district court ruled that "the MBTA is estopped to deny the continuation in force of the agreement dated January 1, 1976. . . ." *Id.* at 317. The court further stated:

> The proposed layoffs of members of the Machinists' Union is in direct violation of the explicit terms of the collective bargaining agreement, and while they may be justified they are properly the subject of arbitration under the existing agreement before they are effectuated. Such arbitration would not be interest arbitration subject to ch. 405 of the Act of 1978.

Id. at 320.

The MBTA appeals this ruling. It argues that it was inappropriate for the district court to invoke the doctrine of equitable estoppel. *See Celluci* v. *Sun Oil Co.*, 2 Mass. App. Ct. 722, 320 N.E. 919, 923 *aff'd* 368 Mass. 811, 331 N.E. 2d 813 (1974). The Machinists disagree. They add that the district court, in any event, should have found that the collective bargaining agreement did not terminate in 1977, that it was only "opened" for changes, and that its terms therefore continue to apply.

We are reluctant to conclude that at the time of its ruling the district court abused its discretion in issuing a preliminary "layoff" injunction. *See Nat. Tank Truck Carriers, Inc.* v. *Burke*, 608 F.2d 819, 823 (1st Cir. 1979). Yet, we note that the questions presented here are now entirely matters of state law. They are closely related to matters which have been, and may still be, subject to adjudication in the state courts. *See Gallahue* v. *MBTA, supra.* Moreover, the district court made its equitable estoppel ruling on the basis of what it described as

an "uncontradicted affidavit" submitted by the Machinists that "the parties have treated the agreement as continuing in force . . . ." 511 F. Supp. at 316-317. In its brief and in various opposition papers, the MBTA appears to dispute this assumption, thus undercutting a premise fundamental to the district court's reasoning. Also, given our holding here, it now seems unlikely that the Machinists can pursue any related federal claim. In addition, the district court wrote on March 17 that the injunction delaying the layoffs pending grievance arbitration was to remain in effect only for a "reasonable time pending the prompt completion of arbitration." 511 F. Supp. at 321. Under these circumstances, we believe it appropriate for the district court to reconsider the propriety of the injunction in light of present circumstances.

V

The decision to grant or deny preliminary injunctive relief ordinarily lies within the sound discretion of the trial court. *Grimard* v. *Carlston*, 567 F.2d 1171, 1173 (1st Cir. 1979). We will not lightly overturn that judgment. *Maceira* v. *Pagan*, 649 F.2d 8, 15 (1st Cir. 1981 (*see* cases cited therein). However, the "application of an improper legal standard" or the "misapplication of an improper legal standard" or the "misapplication of the law to particular facts" provides a basis for reversal. *Planned Parenthood League of Mass.* v. *Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981). We have found that Chapters 405 and 581 are constitutionally sound. For this reason, the Transit Union has failed to demonstrate likelihood of success on the merits, a prerequisite to the granting of preliminary injunctive relief. *Id.* at 1009.

Accordingly, to the extent that it is inconsistent with this opinion, the district court's order of March 17, 1981, as clarified on May 15, 1981, is vacated and the case is remanded for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1180

LOCAL DIVISION 589,
AMALGAMATED TRANSIT UNION, AFL-CIO, CLC,
Plaintiff, Appellant,

v.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Defendants, Appellees.

No. 81-1198

LOCAL DIVISION 589,
AMALGAMATED TRANSIT UNION, AFL-CIO, ET AL.,
Plaintiffs, Appellees,

v.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Defendants, Appellants.

No. 81-1219

LOCAL DIVISION 589,
AMALGAMATED TRANSIT UNION, AFL-CIO,
Plaintiff, Appellee,

v.

THE COMMONWEALTH OF MASSACHUSETTS
Defendant, Appellee,

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Walter Jay Skinner, *U.S. District Judge*]

[511 F. Supp. 312 (D. Mass. 1981)]

Before
Coffin, *Chief Judge*,
Campbell, Bownes and Breyer,
Circuit Judges.

MEMORANDUM AND ORDER

Entered October 23, 1981

PER CURIAM. The plaintiff in these cases, the Transit Union, moves this court to reconsider its decision of September 30, 1981, to rehear this case *en banc*, and to grant an additional thirty days to file a further brief in support of its motions. The parties have had considerable opportunity to argue their position in this case. Initially, when this court considered an application for a stay of the district court's order, the Transit Union filed a brief, a reply brief, and argued orally at hearing. Subsequently, with the court's permission, the Transit Union filed a 100-page brief and a reply brief on the merits; it again participated in oral argument. It has now filed an 11-page brief in support of its present motions. All of these briefs have involved, roughly speaking, the same issues which were considered thoroughly by this court in its September 30, 1981 opinion. We are therefore reluctant, given the demands of other cases, to grant extensions of time, and to invite further briefing.

Moreover, we do not believe that additional briefing is necessary given the arguments that the Transit Union now seeks to raise:

1. The Transit Union states that we did not address the question of whether the Massachusetts state laws violate the Contract Clause of the Constitution through conflict with the 1974 § 13(c) assurances that the Transit Union and the MBTA made to the Secretary of Labor; rather, our Contract Clause discussion focused upon the 1973 Basic Agreement between the Transit Union and the MBTA. It is true that the parties did not argue the "§ 13(c)/Contract Clause" issue as a separate matter before us. But, had they done so, the result would have been the same. We held that Congress intended that § 13(c) assurances be subject to specific state statutes to the contrary. Consequently, any § 13(c) agreement was made subject to possible state enactment of a conflicting statute. Hence, such a statute could not have impaired the obligations of the "contract" (if it was one).

2. The Transit Union argues that we ought not to have applied the standard of *Schwartz* v. *Texas*, 344 U.S. 199 (1952), requiring a clear showing of Congressional intent to preempt a field. Since we are dealing with the question of whether Congress intended a set of lengthy, detailed, specific assurances, presented to the Secretary of Labor by private parties to prevail over state law to the contrary, the *Schwartz* standard would seem appropriate. But even if it is not, the result would not change. Our review of the relevant legislative history, set out in the opinion, makes clear that Congress did not intend the detailed, local assurances negotiated under § 13(c) to invalidate specific state laws to the contrary.

3. The Transit Union reiterates its view that our decision conflicts with the law in other circuits. We discussed the views of other circuits, including that of the Sixth Circuit and Eighth Circuit, in our opinion. We concluded that contrary views, for the most part, are expressed in dicta or alternative holdings. We found no other opinion that explored the issue in depth. None of the cases cited involves the type of conflict

between state law and § 13(c) assurances present here, namely, state law that takes the form of a specific, clear state statute, directly and purposefully aimed at local transit problems (and an ambiguously worded § 13(c) agreement made several years before). We remain convinced that there is not yet any significant conflict on this issue among the circuits. But, in any event, for reasons previously set out, we have not followed the approach that the Transit Union believes the opinions that it cites suggest.

4. The Transit Union points to legislative history showing that § 13(c) was amended by Senator Morse and states that the amendment makes the difference. This court previously reviewed the entire legislative history of the statute, including the Morse amendment. That amendment was directed at the *terms* of the § 13(c) assurance, not at the question of whether the assurance was designed to supersede state law. Indeed, as the opinion points out, Senator Morse himself subsequently stated that the "state can continue its [conflicting] policy if it wishes to; but . . . the State should not be allowed to receive Federal money . . . ."

5. The Transit Union states that a rehearing *en banc* is required because we have modified a prior decision, *Local Division 714, Amalgamated Transit Union* v. *Greater Portland Transit District*, 589 F.2d 1 (1st Cir. 1978). The "question of when to hold, or when not to hold, an *en banc* hearing is within the discretion of this court." *United States* v. *Martorano*, 620 F.2d 912 (1st Cir. 1980); Fed. R. App. P. 35(a). As we pointed out, we have not overruled *Greater Portland*. *Greater Portland* holds that the federal courts have jurisdiction to enforce § 13(c) agreements. We stated that we would not follow language in that opinion insofar as it might be read to suggest that a § 13(c) assurance automatically prevails over conflicting state law. *Greater Portland* will still offer both jurisdiction and meaningful relief in other cases.

6. The Transit Union makes other arguments related to the enforceability of § 13(c) and potential conflict between state law and that statute. We have discussed these issues in the opinion, describing the discretion that Congress meant to confer upon the Secretary of Labor and concluding that the Secretary maintains authority to prevent violation of the statute.

This cursory review of the issues the Transit Union now raises is meant to suggest that, for the most part, its arguments are dealt with more thoroughly in our previous opinion and that its other arguments do not provide adequate reason for a rehearing or a rehearing *en banc*. Consequently, the motions for a rehearing, rehearing *en banc*, and for an extension of time to file a further brief are denied.

By the Court:

/s/_____
DANA H. GALLUP.
Clerk.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS SUPERIOR COURT

Complaint — 45919

JOHN J. GALLAHUE, JR., ET AL.,
Plaintiffs
V.
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,
Defendant

1. Plaintiffs are thirty-six individual residents of this Commonwealth of Massachusetts and employees of the Massachusetts Bay Transportation Authority (hereinafter "Authority" or "MBTA"), and members of twenty-five local unions (hereinafter "the unions") which are the duly authorized exclusive representatives of MBTA employees in collective bargaining with the Authority. Plaintiffs fairly represent the interests of all of the members of their respective unions. A list of the plaintiffs, by local union, name and address, is attached hereto, marked "Exhibit A", and incorporated herein by reference.

2. The defendant, Massachusetts Bay Transportation Authority, is a body politic and corporate and a political subdivision of the Commonwealth, with the power to sue and be sued under G.L. c. 161A, § 2. The Authority's principal office is in Boston in the County of Suffolk.

3. Each of the Unions has a collective bargaining agreement with the Authority, presently in effect and to remain in effect until at least December 31, 1980.

4. Each of the collective bargaining agreements contains a "rollover provision", which calls for it to remain in effect "from year to year thereafter unless changed by the parties hereto."

5. In addition, each of the collective bargaining agreements contains a "past practices" provision, which states that all existing practices not expressly covered therein are made part of the agreement.

6. In violation of the express terms of its written collective bargaining agreements, the Authority has failed and refused to pay cost-of-living wage increases, effective December 6, 1980, to members of Locals 6, 264 and 717. Plaintiffs are informed and believe, and therefore aver, that the Authority intends to withhold all other cost-of-living wage increases as they become due and payable under the various collective bargaining agreements.

7. In violation of the express terms of its written collective bargaining agreements, and of the seniority and past practices provisions of the agreements, the Authority is reassigning employees, who are affected by the dropping of routes, to "cover lists". Previously, such employees were afforded access to other positions, in accordance with their seniority.

8. The Authority has announced its intention to restrict employee overtime, effective January 3, 1981, in a manner which will violate the express terms of the collective bargaining agreements and the past practices provisions thereof. A true copy of the Authority's Special Order 80-106, dated December 9, 1980, on this subject is attached hereto, marked "Exhibit B", and incorporated herein by reference.

9. The Authority has announced its intention, effective January 3, 1981, to reduce the number of guards on trains of two cars or more, to less than one guard for each two cars, in violation of the past practices provisions of its collective bargaining agreements.

10. Plaintiffs are informed and believe, and therefore aver, that the Authority intends to commence contracting with third parties for goods now made and for services now provided by MBTA employees; to commence hiring part-time em-

ployees; to cease filling vacancies by means of seniority; and to exclude consideration of overtime in pension benefit payments. These proposed actions will violate the express terms of plaintiffs' collective bargaining agreements with the Authority, and the past practices provisions thereof.

11. It would be futile to require plaintiffs to exhaust the usual grievance process, because the Authority claims that its conduct and proposed conduct, complained of hereinabove, is justified and/or required by Chapter 581 of the Acts of 1980, passed on December 7, 1980.

12. The Authority's said conduct and proposed conduct is not justified or required by the enactment of Chapter 581 of the Acts of 1980. Except for its provisions relating to reduction of guards and not filling vacancies, that legislation does not authorize departures from existing collective bargaining agreements. To whatever extent the statute can be said to affect plaintiffs' present contractual rights, it is unconstitutional as impairing the obligations of contracts. United States Constitution, Article I, Section 10.

13. Plaintiffs will be immediately and irreparably injured if the Authority is not ordered to cease and desist from its present conduct, complained of hereinabove, or if the Authority's proposed conduct, also complained of hereinabove, is not enjoined.

14. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs pray:

1. For a short order of notice to defendant, to come into Court and show cause why relief hereunder should not be granted.

2. For a preliminary injunction enjoining the defendant, Massachusetts Bay Transportation Authority, its agents, servants, employees and attorneys, from disregarding or violating the express terms, including past practices provisions, of col-

lective bargaining agreements between the said Authority and its employees.

3. For a preliminary injunction enjoining the defendant, Massachusetts Bay Transportation Authority, its agents, servants, employees and agents. from refusing to arbitrate the grievances of labor unions representing its employees.

4. For a permanent injunction enjoining the defendant, Massachusetts Bay Transportation Authority, its agents, servants, employees and attorneys, from disregarding or violating the express terms, including past practices provisions, of collective bargaining agreements between the said Authority and its employees.

5. For a permanent injunction enjoining the defendant, Massachusetts Bay Transportation Authority, its agents, servants, employees and attorneys, from refusing to arbitrate the grievances of labor unions representing its employees.

6. For such further relief as may be appropriate.

By its attorneys,
DiMENTO & SULLIVAN

/s/_____
James J. Sullivan, Jr.
100 State Street
Boston, Massachusetts 02109
(617) 523-5253

VERIFICATION

I, John J. Gallahue, Jr., one of the plaintiffs in the above action, certify that I have read the foregoing complaint, and all factual allegations therein are true, to the best of my knowledge and belief.

_____
John J. Gallahue, Jr.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS December 24, 1980

Then appeared John J. Gallahue, Jr., and made oath to the truth of the foregoing, before me, this twenty-fourth day of December, 1980.

_____

Notary Public

My commission expires: _____

COMMONWEALTH OF MASSACHUSETTS
AMENDMENT TO COMPLAINT

SUFFOLK, SS

SUPERIOR COURT
NO. 45919

JOHN J. GALLAHUE, JR., ET AL.,
Plaintiffs
V.
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,
Defendants

Pursuant to the Order of this Court dated January 7, 1981, plaintiffs' Complaint is hereby amended by naming, as parties in interest, the following unions, of which the individual plaintiffs are members and whose contractual rights the individual plaintiffs seek to enforce in this action:

(a) Local No. 6, Office & Professional Employees International Union, AFL-CIO:
  (1) Clerical Unit
  (2) Adjuster Unit
  (3) Investigator and Investigator-Photographer Unit;

(b) International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 104;

(c) Local 105, International Federation of Professional and Technical Engineers, AFL-CIO;

(d) Boston Lodge 264 of District No. 38, International Association of Machinists & Aerospace Workers, AFL-CIO (Machinists);

(e) Boston Lodge No. 384, Allied Services Division, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (Towermen);

(f) Local 453, Office and Professional Employees International Union, AFL-CIO;
(g) Local Division 589, Amalgamated Transit Union, AFL-CIO (Carmen);
(h) Local Union No. 717 of the International Brotherhood of Electrical Workers, AFL-CIO;
(i) Massachusetts Bay Transportation Authority Police Association (Police);
(j) Building & Construction Trades' Council of the Metropolitan District;
(k) Alliance of Unions of the Massachusetts Bay Transportation Authority (Alliance);
(l) M.B.T.A. Starters and Inspectors Association.

By their attorneys,
DiMENTO & SULLIVAN

/s/_____
James J. Sullivan, Jr.
100 State Street
Boston, Massachusetts 02109
(617) 523-5253

January 9, 1981

CERTIFICATE OF SERVICE

Boston, Massachusetts January 9, 1981

I hereby certify that I this day served the foregoing upon the defendant by causing a copy thereof to be mailed, postage prepaid, to its counsel of record: Joseph H. Elcock, 50 High Street, Boston, Massachusetts 02110.

/s/_____
James J. Sullivan, Jr.

Request for preliminary injunction by the plaintiffs who are members of the alliance of unions of the MBTA and those plaintiffs who are members of the starters and inspectors association is denied. The request for the remaining plaintiffs for the preliminary injunction is denied at this time. The court reserving the right to modify this order and grant the preliminary injunction requested at any time within 7 days hereof upon a careful review of the many contracts involved herein.

Court Order in the case of John J. Gallahue, Jr., et als v. M.B.T.A., Superior Court NO. 45919

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
NO. 45919

JOHN J. GALLAHUE, JR., et al.

v.

MASSACHUSETTS BAY AUTHORITY

FURTHER ORDER ON THE REQUEST OF THE PLAINTIFFS FOR A PRELIMINARY INJUNCTION

After a careful review of the actual contracts between the Massachusetts Bay Transportation Authority and each of the unions representing the individually named plaintiffs herein, and pursuant to the order of this Court entered on Wednesday, December 30, 1980, and upon further reflection, the Court concludes that the earlier order entered herein ought be modified and limited injunctive relief granted.

Now, therefore, in consideration of the affidavits and representations of the parties, and upon review of the existing contracts between the Massachusetts Bay Transportation Authority and the unions representing the individually named plaintiffs, it is ordered that:

a. provided that the plaintiffs amend their complaint to name as parties in interest the unions of which they are members and whose contractual rights they here seek to enforce; and
b. provided that Local 589, Amalgamated Transit Union (Carmens Local 589) posts a bond in the amount of $50,000, and each of the other plaintiff unions who shall

obtain the benefits of preliminary injunctive relief shall post a bond in the amount of $25,000 to secure the Massachusetts Bay Transportation Authority against such damages as it may sustain should it be determined that this injunction has been entered improvidently.

Then the Massachusetts Bay Transportation Authority, its directors, officers, employees, agents, servants, and all persons of whatsoever name and nature who shall act in concert with it, shall be preliminarily enjoined from:

1. *Vacancies.* As to Local 6, Office and Professional Employees International Union (Clerical Local 6), Boston Lodge 264 of District No. 38, International Association of Machinists and Aerospace Workers (Machinists Local 264), Carmens Local 589, the Building and Construction Trades Council of the Metropolitan District (Construction Tradesmen), and the Massachusetts Bay Transportation Authority Police Association (Police) failing to advertise permanent vacancies (other than vacancies caused by a reduction in force) in accordance with the contracts between the several unions named and the M.B.T.A. and then, should the Secretary of Administration and Finance permit such vacancy to be filled in accordance with St. 1980, c. 581, § 23, from filling such vacancies save in accordance with the seniority provisions of the respective union contracts;[1]

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[1] The contracts of the M.B.T.A. with each of the named unions contain language which clearly expresses the intent of the parties that the provisions of the contract continue — at least for some period — while a new contract is being negotiated. Certain of the contracts contain language to the effect that — following a request for change in the contract terms and the expiration of a stated period (generally sixty days) — the contract will be "opened up." The Court interprets this language to mean that contract provisions previ-

2. *Cover Lists.* As to Clerical Local 6 and Boston Lodge No. 384, Allied Services Division, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (Tower Men Lodge 384), from assigning members of these two unions to "cover lists", so-called, or active or inactive reserve status without complying with the seniority provisions contained in Article XXV of the contract between the M.B.T.A. and Clerical Local 6, or the seniority provisions of Article XIX of the contract between the M.B.T.A. and Tower Men Lodge 384, respectively, and as to Carmens Local 589 and the M.B.T.A. Police, from failing to recall members of those unions to specifically assigned duties from "cover lists", so-called, in any other order than the seniority established by the respective contracts with those unions;

3. *Overtime.* No injunctive relief granted;[2]

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ously in effect shall come to an end and the entire contract shall be renegotiated. The remaining contracts contain language implying that the prior contract provisions remain in effect until a new contract is renegotiated. For injunctive purposes, this Court concludes that it is unreasonable to interpret these provisions so as to continue the prior provisions forever. Such an interpretation would give undue bargaining power to one of the parties who could avoid any renegotiation simply by standing on the provisions of the prior contract. Accordingly, for purposes of granting injunctive relief, this Court shall set a six month period to injunctive relief granted on the basis of such contracts since this seems a reasonable time within which the parties may renegotiate them.

[2] The public interest in safe operation of the M.B.T.A. cuts against injunctive relief to require allowing personnel to return to duty after only six hours' rest notwithstanding the provisions of the applicable contract with Carmens Local 589. Moreover, an adequate remedy at law may well be fashioned. Pursuant to Mass.R.Civ.P. 16, the M.B.T.A. and Carmens Local 589 are directed to agree forthwith upon a procedure for identifying those individuals who, in the absence of Special Order No. 80-106, would have opted for overtime runs with available rest time of less than eight hours between runs. A running calculation is to be maintained by the parties concerning

4. *Guards.* As to Carmen Local 589, from failing to post less than one guard for each two cars on trains of two cars or more;[3]

5. *Subcontracting.* No injunctive relief granted;[4]

6. *Part-time Employees.* From hiring part-time employees to perform work ordinarily performed by Carmens Local 589, save in accordance with paragraph 124 of the contract between the M.B.T.A. and that union from hiring part-time employees to perform work normally performed by the members of Clerical Local 6, save in accordance with Article III(a) of the contract between the M.B.T.A. and that union, from hiring part-time employees to perform work normally performed by the members of Local 717, International Brotherhood of Electrical Workers, save in accordance with Article XXV of the contract between the M.B.T.A. and that union, from hiring part-time employees to perform work normally

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the names and amounts of overtime which would have been earned by such individuals in the absence of Special Order No. 80-106. Should the parties fail to agree upon such a procedure, a further hearing may be ordered to require the establishment of an escrow fund for the payment of such claims should Carmens Local 589 succeed upon this point.

[3] While St. 1980 c. 581, § 1 repealed G.L. c. 161, § 91A and thereby extinguished the penalty imposed upon the M.B.T.A. should it fail to assign a guard to each two cars of passenger trains consisting of more than one car, the legislative action cannot be read as extinguishing what all parties were entitled to rely upon as a past practice since 1935. Moreover, in this instance, the public safety, as well as the safety of the members of Carmens Local 589, cuts in favor of limited injunctive relief.

[4] Certain of the contracts prohibit subcontracting the work of the unions involved to others. Injunctive relief does not seem warranted to prevent this practice despite a showing of reasonable likelihood of success since the damages to the union from the alleged imminent breach of contract, while perhaps difficult of calculation, are far from impossible to ascertain. Accordingly an adequate remedy at law in money damages exists.

performed by members of Machinists Local 264, save in accordance with Article XIV-B of the contract between the M.B.T.A. and that union, and from hiring part-time employees to perform work normally performed by the members of the Construction Tradesmen, save in accordance with Articles XVI and XXIII of the contract between the M.B.T.A. and that union.

As to the M.B.T.A. and the members of the Construction Tradesmen, this injunction shall remain in full force and effect until further order of this Court or until final judgment in this case, or until the passing of six months after the expiration date of the contract between the Building Trades Council and the M.B.T.A., whichever shall first occur. As to Electrical Workers Locals 104 and 717, and Machinists Local 264, this injunction shall remain in full force and effect until further order of this Court, until final judgment in this case, until the completion of grievance, mediation, and arbitration procedures as provided for in the respective contracts with the unions named, until the renegotiation of a new contract, or until Monday, March 2, 1981, whichever shall first occur. As to the M.B.T.A. and the members of the remaining unions named above, this injunction shall remain in full force and effect until further order of this Court, until the entry of final judgment in this action, until the completion of grievance, mediation, and arbitration procedures called for in the contracts between the M.B.T.A. and the respective unions, until the renegotiation of a new contract with the respective union, or until Friday, July 3, 1981, whichever shall first occur.

It is so ORDERED.

By the Court.

/s/_____
William G. Young
Justice of the Superior Court

Dated: January 7, 1981

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
NO. 45919

JOHN J. GALLAHUE, JR., et al.

v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

MEMORANDUM AND ORDER ON THE MOTION OF THE DEFENDANT TO VACATE OR MODIFY PRELIMINARY INJUNCTION

This matter came on for further hearing upon the motion of the defendant Massachusetts Bay Transportation Authority (MBTA) to vacate or modify the preliminary injunction entered herein on January 7, 1981. No one suggests that any of the underlying circumstances have changed. See *Mancusos* v. *Sarkis*, Mass. Adv. Sh. (1981) 145, 150-151. Thus, the motion of the MBTA is in the nature of a motion for re-hearing and will be treated as such.

Quite properly, the MBTA points out that the reference to Electrical Workers Local 104 is entirely inadvertant. The preliminary injunction entered on January 7, 1981 was not intended by the court to enjoin the MBTA from any action with respect to the members of Electrical Workers Local 104 and the reference to that union in the last paragraph of the order is stricken.

With a single exception, however, the substantive points raised by the MBTA appear to be without merit. The interplay between the various contracts between the several unions

and the MBTA and St. 1980, c. 581 was fully explored prior to the entry of the preliminary injunction of January 7, 1981 and there appears to be no occasion to vacate the injunction.

In one respect, however, the preliminary injunction appears, on re-hearing, to be overbroad. Paragraph 4 of the preliminary injunction prohibits the MBTA, as to the members of Local 589, Amalgamated Transit Union, from posting less than one guard for each two cars on trains of two cars or more.

For the first time, the MBTA, during argument upon the motion for re-hearing, brought to the court's attention a 1976 arbitration decision *In The Matter of the Arbitration Between Massachusetts Bay Transportation Authority and Local Union 589, Amalgamated Transit* (slip opinion, May 19, 1976). In that decision, after ten days of hearings which generated 1,946 pages of transcript, the Board of Arbitration selected by the parties in accordance with the terms of the contract between them found "that the parties have never jointly considered or agreed upon the guard issue on Rapid Transit trains as a past practice under the meaning of Part 1 — general of the Agreement." *Id.* at 9. There is no doubt but that the Board of Arbitration was there considering precisely the same contract as is presently before the court and that the quoted language reflects their considered decision upon a matter argued to them. In view of these undisputed facts, the MBTA now argues that this court was mistaken in its preliminary conclusion that there was a reasonable likelihood that the union would ultimately persuade the fact-finder that the posting of guards which had long been statutorily mandated had become a past practice within the meaning of the contract between the MBTA and the union.

At the outset, the court notes that, due to the tardiness of the MBTA in raising the issue of this arbitration award, the determination whether to reconsider an earlier court ruling is

wholly a matter of discretion. Surely it was obvious at the time of the original hearing upon the unions' motion for a preliminary injunction that the guard issue would be one of the central concerns argued to the court. Nevertheless, the MBTA made no reference whatsoever to this 1976 arbitration award. In these circumstances, this court would be entirely justified in refusing to reconsider its earlier ruling which has now become law of the case. A party simply cannot be heard to argue fully at one hearing on a motion for a preliminary injunction and then, having lost, secure a re-hearing upon grounds such as these, absent some change in factual circumstances. A contrary rule would encourage parties to fragment their legal arguments, advancing one at a time in successive motions for re-hearing in the hope that one such argument would eventually find favor with the court. This court does not countenance such a practice and the laxity of the MBTA upon such a critical matter is inexplicable. Nevertheless, in the interests of justice and purely as a discretionary matter, this court turns to a consideration of the 1976 arbitration award.

Careful consideration of that award convinces this court that the parties are not now free to re-litigate in this forum the issue of whether the posting of guards has become a "past practice" under the contract between them. After a ten day evidentiary hearing and the examination of 375 exhibits, the three member Board of Arbitration concluded that the matter of guards had not become a "past practice" between the parties and thus construed precisely the aspect of the present contract at issue before the court. Accordingly, this particular claim may not now be relitigated before this court. *Ritchie* v. *Landau*, 475 F.2d 151 (2d Cir. 1973). *International Ass'n of Machinists and Aerospace Workers* v. *Aerojet General Corp.*, 263 F. Supp. 343 (C.D. Cal. 1966). Restatement 2d, Judgments, § 132(2) (tent. draft no. 7, April 11, 1980). See also

Spring Cotton Mills v. *Buster Boy Suit Co.*, 275 App. Div. 196, 88 N.Y. Supp. 2d 295 (1949); *Arbitration between Board of Education of Cook County and Evanston High School Teachers' Council*, 73 BNA Lab. Arbit. 310 (1979); El Kouri & El Kouri, *How Arbitration Works*, 373-81 (1973).

> [T]here is good reason to treat the determination of the issues in an arbitration proceeding as conclusive in a subsequent proceeding, just as determinations of a court would be so treated. When arbitration affords opportunity for presentation of evidence and argument substantially similar in form and scope to judicial proceedings, the award should have the same effect on issues necessarily determined as a judgment has. Economies of time and effort are thereby achieved for the winning party and for the tribunal in which the issue subsequently arises.

Restatement 2d, Judgments, § 132, comment c, "issue preclusion" (tent. draft no. 7, April 11, 1980).

The union argues that the issue before the arbitrators was different from the one presented to this court. The statement is made in such conclusory terms that it is difficult to understand the argument. If, however, as may well be the case, the union is suggesting that the positions of the parties are reversed in this proceeding, the outcome must still remain the same. It may well be that in 1976 before the arbitrators the MBTA was seeking to have the guard issue declared a "past practice" in order that it might become a matter of negotiation while the union was resting upon the existing statutory mandate. G.L. c. 161, § 91A repealed by St. 1980 c. 581, § 1. Even if this were the case, the MBTA would not be precluded from relying upon the 1976 arbitration award. Indeed, it would be the union which would be judicially estopped from arguing in

this forum a position wholly contrary to that asserted before the arbitrators and upon which the union had prevailed.

Finally, the union points out this court's concern for the safety of union members, arguing that this is an independent ground for determination of the guard issue. The union misreads the earlier order of this court. The concern for the safety of union members and the general public supplied the likelihood of irreparable injury which, when coupled to what the court perceived was a reasonable likelihood of success, warranted this court in entering that aspect of the injunction presently under review. Now, however, far from having a reasonable likelihood of success on the guards issue, this court rules that the union is, in fact, entirely precluded from re-litigating that matter in this forum. Accordingly, paragraph 4 of the preliminary injunction entered on January 7, 1981, must be, and is hereby, vacated.

In summary, then, the preliminary injunction entered on January 7, 1981, is modified by vacating paragraph 4 thereof and deleting from the last paragraph thereof the reference to Electrical Workers Local 104. In all other respects the preliminary injunction of January 7, 1981 remains in full force and effect until it expires by its own terms.

It is SO ORDERED.

/s/ _____
William G. Young
Justice of the Superior Court

Entered: February 2, 1981

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

Suffolk, ss. CIVIL ACTION
NO. 45919

JOHN J. GALLAHUE, JR. et al.
Plaintiffs

v

MASSACHUSETTS BAY TRANSPORTATION
AUTHORITY
Defendant

MEMORANDUM AND ORDER OF THE COURT UPON
THE MOTION OF THE PLAINTIFFS
FOR RECONSIDERATION

This matter came on for further hearing upon the motion of the plaintiffs for reconsideration of the order of the court dated February 2, 1981, which vacated Paragraph 4 (Guards) of a preliminary injunction entered by this court on January 7, 1981. Upon reconsideration, and after hearing the arguments of the parties, it appears that the arbitration order of May 19, 1976, upon which this court relied to conclude that the union was precluded in the present proceedings from asserting that the issue of the posting of guards is a past practice and required under the contract between the Carmen's Union and the MBTA is, at best, vague, and may well be properly interpreted as an action by the Board of Arbitration to do no more than exclude the guards issue from consideration. In this regard, the court notes that it appears from the papers submitted that, during that arbitration, the MBTA itself took the position that

the posting of guards on multi-car trains was a past practice under the existing contract.

Therefore, insofar as the memorandum and order of February 2, 1981, declares that the Carmen's Union is precluded in these proceedings from further litigating that issue on the ground of the past Board of Arbitration decision, that conclusion is vacated, and this court expresses its opinion that the union may go forward to litigate that issue in the present case.

The Carmen's Union further seeks reinstatement of Paragraph 4 of the preliminary injunction entered on January 7, 1981; but, upon reflection, this court concludes that it ought not reinstate the injunction requiring the MBTA to maintain the prior level of guards on its trains. The court is mindful that the safety of the members of the Carmen's Union may well be involved, but the present record falls short of demonstrating the immediate and irreparable harm necessary for injunctive relief.

Therefore, in short, the Carmen's Union is not precluded from further litigating the guards issue in this proceeding, but no modification of the present status of injunctive relief is warranted.

It is so ordered.

/s/ _____
Hon. William G. Young
Justice

February 24, 1981

Commonwealth of Massachusetts

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION
No. 45919

JOHN J. GALLAHUE, JR., ET AL
PLAINTIFF(S)

v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,
DEFENDANT

INTERLOCUTORY ORDER ON PRELIMINARY INJUNCTION

This action came on to be further heard at this sitting to show cause why the application for a preliminary injunction should not be granted, and was argued by counsel; and thereupon, upon consideration thereof, it is ORDERED and ADJUDGED that upon payment to the clerk of the sum of $25.00 the application in the Motion filed March 19, 1981 is granted and the defendant, Massachusetts Bay Transportation Authority be and hereby is enjoined and restrained from reducing the numbers of guards, in order to preserve the status quo pending the outcome of or until the completion of grievance, mediation and arbitration proceedings, or until the renegotiation of a new contract, or until Wednesday, July 8, 1981, whichever shall first occur.

until further order of Court.

By the Court (Ronan, J.)

Entered March 20, 1981. /s/ _____
Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
No. 45919

JOHN J. GALLAHUE, JR., ET AL

vs.

MASSACHUSETTS BAY TRANSPORATION AUTHORITY

ORDER ON PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

After hearing, examination of the affidavits submitted and considering the memoranda filed by counsel, and also examining prior memoranda of this court (Young, J.) filed on 1-7-81, 2-2-81 and 2-24-81 and concluding there has been a showing as to the likelihood of success on the merits, a change in circumstances in the proposed action of the Authority scheduled for March 21, 1981, a showing of present physical risk to the plaintiffs and a *strong public interest to be protected* (injury to the public) the Motion is ALLOWED (see order).

By the Court, (Ronan, J.)

/s/
Asst. Clerk

Dated: March 20, 1981

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 81-0072-CV

JOHN J. GALLAHUE, JR., ET AL,

vs.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY.

ORDER

This case came on to be heard on the petition of the Authority under G. L. c. 231, § 118, for relief from interlocutory injunctive orders of the Superior Court dated January 7, February 2, February 24, and March 20, 1981. The scope of review has necessarily been limited by the paucity of the record before this court, which includes only the petition and the four orders in question; the complaint and answer in the underlying Superior Court action; a memorandum by the Authority in support of its petition; and a memorandum and order by Skinner, J., of the United States District Court for the District of Massachusetts dated March 17, 1981, in a related case involving the same parties. In consideration of the aforesaid papers and the arguments of counsel, I am unable to determine that the orders in question are tainted by error of law or abuse of discretion. Some of the contentions of the Authority, such as, that the orders fail to take account of various differences in the collective bargaining agreements with the plaintiff unions and that the injunctions go beyond the scope of the complaint, seem, at least superficially, to be contradicted by the record before me.

Several of the contentions depend on the terms of the various collective bargaining agreements, but those agreements are not before me. The contentions that the Authority has not had a full opportunity to be heard on the merits, that the orders are predicated on assumptions of fact which have not been found upon evidence, and that the orders constitute "preliminary declarations of the rights of the parties," are all, to a certain extent, true; but such is inherent in the fairly informal preliminary injunctive practice which characterizes our system. The alleged conflict with St. 1980, c. 581, has not been spelled out in enough detail to enable the court to understand the contention. On the face of the record, the several orders have not been made to appear an inappropriate adjustment of the rights of the parties pendente lite. The relief sought is therefore denied.

By the Court (Armstrong, J.),

/s/
Assistant Clerk

Entered: April 3, 1981.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

July 2, 1981

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION

PLEASE TAKE NOTICE THAT:

No. 45919

JOHN J. GALLAHUE, JR., ET AL VS MASS. BAY TRANSPORTATION AUTHORITY

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PLAINTIFFS'MOTION FOR EXTENSION OF INJUNCTIVE RELIEF, AFTER HEARING, MOTION DENIED.-July 1, 1981-YOUNG, J.

MICHAEL JOSEPH DONOVAN
CLERK/MAGISTRATE

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
No. 45919

JOHN J. GALLAHUE, JR., ET AL.,
PLAINTIFFS

v.

MEMORANDUM OF
DECISION DENYING
INJUNCTIVE RELIEF

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,
DEFENDANT

This Court has heard arguments and reviewed briefs and exhibits on the question of whether or not a preliminary injunction should issue to bar the implementation of a reduction, effective November 7, 1981, of the present guard force on the M.B.T.A. On that day eighty (80) guards will be discharged and on Monday, November 11th, twelve (12) of those laid off will be rehired resulting in a reduction in the guard force of sixty-eight (68).

Courts exercising equity jurisdiction are vested with broad discretion in the exercise of their powers. The decision to grant or deny preliminary injunctive relief ordinarily lies within the sound discretion of the trial court. *Grimard* v. *Carlston*, 567 F.2d 1171, 1173 (1st Cir. 1979); *Weinburg* v. *Goldstein*, 241 Mass. 259, 261 (1922).

In the present case I find no irreparable injury. Loss of pay and even loss of a job are not, in themselves, irreparable harm. Money damages are not irreparable harm. *Taunton Gardens* v. *Hills*, 396 F.Supp. 370, 373 (D. Mass. 1975).

Should the lay-offs prove to be wrongful, plaintiffs have an adequate remedy at law, i.e. money damages. Where such

adequate legal remedy exists, equity powers should not be invoked. *Conlon* v. *Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 25*, 409 F.Supp. 1165, 1167 (D. Mass. 1976); *Brewer* v. *City of Springfield*, 97 Mass. 152, 154 (1867).

How about physical risk to the remaining union members still on the job? Or to the traveling public?

This Court is particularly concerned with the safety aspects of the lay-offs, but the evidence now before this Court is not convincing. I am not persuaded that the remaining employees will face an increased physical hazard so great that this Court should now intervene and stop the lay-offs. Nor does the record before me indicate that the reduction in the guard force exposes the public to a substantial hazard which would not otherwise exist. (See the similar finding in this case by Judge William Young dated February 24, 1981.)

New guards are not being trained in police work nor are they badged. Their primary job is to open doors. They have other duties, including assisting passengers in case of emergencies. However, this Court has no evidence that laying off sixty-eight (68) guards will reduce the number of employees to a point where emergencies cannot be coped with. I am aware that the plaintiff, who is the president of Local Division 589, says that eighty (80) motormen (out of 144 motormen) are concerned about a reduction in guards. But, plaintiff's statement does not, in itself, warrant court interference with management perogatives. What do the other sixty-four (64) motormen say? Are the motormen entirely objective and disinterested?

I have read with interest both the February 13, 1980 study by the Legislative Research Council entitled *Crime on Public Transportation Systems* and the Wasserman study of December, 1979, entitled *The Problem of Security In The M.B.T.A.* Both studies make numerous suggestions for better security in the system, but neither study says don't lay off guards. The

M.B.T.A. is now increasing its police force. The addition of men specifically trained to deal with crime seems like a much better way to solve the problem than to employ more guards than are necessary for their primary duty of opening doors.

As to crime in the M.B.T.A. system, as serious a problem as this might be, the Wasserman report points out that people are safer on the M.B.T.A. system than they would be on the streets of Boston. See pp. 3-17 through 3-19.

Both crime studies recommend many steps to decrease crime on the M.B.T.A. More guards are not suggested.

As to the likelihood of success on the merits, it is very dim. This case was commenced in December, 1980. Companion actions were commenced in the federal court. The attacks on Chapter 581 of the Acts of 1980, have failed. See *Local Division 589 A.T.U.* v. *Commonwealth*, First Circuit Court of Appeals decision dated September 30, 1981.

And a balancing of equities would seem to favor the defendant. Employees wrongfully maintained on the job would not only add to the expense of operating the M.B.T.A. and hamper management in reassigning guards to other duties but, as a practical matter, salaries wrongfully paid could never be recouped by the M.B.T.A. See *International Association of Machinists and Aerospace Workers* v. *Northeast Airlines*, 409 U.S. 845 (19).

Finally, this Court is most concerned with the public [illegible]rest. See *Gordon* v. *Bolson Dow Mfg.*, 313 Mass. 290 (1943). Affidavits filed in the federal case by the M.B.T.A. claim that salaries of M.B.T.A. workers in every job category are significantly higher than those of Massachusetts state and municipal workers doing comparable work; that the average M.B.T.A. employee earns 79% more than the average manufacturing industry worker in Massachusetts, that the M.B.T.A.'s cost per mile is 83% higher than the next most inefficient system, that "featherbedding" is rampant and that the M.B.T.A. lacks flex-

ibility to adjust job assignments or reclassify employees. *Local Division 589 A.T.U.* v. *Commonwealth*, op. cit. pp. 55 and 56. Without deciding — for, indeed, this Court is in no position to do so — the truth of those allegations, this Court merely points out that denying plaintiff's request for an injunction may well serve the public interest best. At any rate, the plaintiff has not shown that the public interest would best be served by keeping more guards on the job than management thinks is necessary.

For these reasons, the injunction is denied.

Andrew Gill Meyer
Justice of the Superior Court

Dated: November 13, 1981

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
No. 51214

MEMORANDUM OF OPINION DENYING RELIEF AND DISMISSING COMPLAINT

BOSTON LODGE 264 OF DISTRICT 38, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
PLAINTIFF

v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,
DEFENDANT

Plaintiff seeks an order from this Court requiring the defendant to join with the plaintiff in selecting an arbitrator and proceed to arbitration on the subject of cost-of-living adjustments due union members under a collective bargaining agreement entered into by the parties on January 1, 1976.

That contract was, by its terms, to continue until December 31, 1977, and from year to year thereafter unless notice of a desire to change or terminate the contract is served by one party or the other at least sixty (60) days before the next anniversary. A notice to change was so served by both parties in October of 1977. This notice cut off the "year to year" provision and the contract was terminated.

Plaintiff has, in this and in related suits, contested this legal conclusion and advanced the theory of a perpetual contract. Such theory has been rejected by Judge William Young. *Gallahue* v. *M.B.T.A.*, Mass. Superior Court, Suffolk County No. 45917, slip op. at n.1 (January 7, 1981). So did Judge Breyer of the First Circuit Court of Appeals. *Local Division 589 A.T.U.* v. *Commonwealth*, Nos. 80-1180, 81-1198 and 81-1219. So did Judge Walter Skinner of the District Court. 511 F.Supp. 312 (D. Mass. 1981).

However, Judge Skinner, relying on the principle of equitable estoppel ruled that the M.B.T.A. was estopped to deny the continued existence of the contract.

The Circuit Court reversed Judge Skinner and remanded the case to him to reconsider the propriety of his injunction.

The Circuit Court also rejected constitutional arguments that Chapter 405 of the Acts of 1978 and Chapter 581 of the Acts of 1980 impaired the obligation of existing contracts or conflicted with federal laws.

Defendant stopped paying cost-of-living salary adjustments in December 1980. It was, in fact, forbidden to do so by G.L. c. 161A, § 19 as amended and effective on December 8, 1980.

In conclusion, there is no contract now in effect. Even if there were, the defendant is barred from making cost-of-living payments.

Plaintiff's remedy is to file a grievance with the state Board of Conciliation and Arbitration. See G.L. c. 161A, § 19.

It is therefore ORDERED and ADJUDGED that the complaint be dismissed with prejudice and without costs.

Andrew G. Meyer
Justice of the Superior Court

Dated: November 10, 1981

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT
No. 51582

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO,

PLAINTIFF

v.

PETITION FOR DECLARATORY RELIEF

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,

DEFENDANT

1. The plaintiff, Local Division 589, is the local union for most employees of the Massachusetts Bay Transportation Authority (hereinafter "MBTA").

2. The defendant, MBTA, is a body politic and corporate and a political subdivision of the Commonwealth, with the power to sue and be sued under G.L. c. 161A, § 2. The MBTA's principal office is in Boston in the County of Suffolk.

3. The plaintiff and the defendant entered into a written collective bargaining agreement, entitled Memorandum of Understanding, on August 8, 1979. That agreement provides for self-extention by means of a "roll-over" provision.

4. The 1979 Memorandum of Understanding provided that the agreement would be in effect until December 31, 1980 and "from year to year thereafter unless changed by the parties," and further provided for a means by which each of the parties would notify the other of any changes desired in the agreement one hundred and eighty (180) days prior to December 31, 1980. If proposed changes are not agreed to in collective bargaining, they are subject to interest arbitration.

5. Pursuant thereto, the parties timely exchanged proposals for specific desired changes in the Articles of Agreement, thus triggering collective bargaining negotiations. No notice was given by either party of a desire to terminate, *in toto*, the collective bargaining agreement.

6. After the negotiations were under way, the Massachusetts Legislature passed Chapter 581 of the Acts of 1980, including the so-called "management rights package", exempting certain subjects, prospectively, from collective bargaining and arbitration.

7. The United States Court of Appeals For the First Circuit, in *Local Division 589, Amalgamated Transit Union, AFL-CIO, CLC* v. *The Commonwealth of Massachusetts*, No. 81-1180, *Local Division 589, Amalgamated Transit Union AFL-CIO, Et. Al.* v. *The Commonwealth of Massachusetts*, No. 81-1198, *Local Division 589, Amalgamated Transit Union, AFL-CIO* v. *Massachusetts Bay Transportation Authority*, No. 81-1219 (Exhibit "A" attached hereto) has ruled, *inter alia*, that c. 581 is not unconstitutional.

8. The Court of Appeals stated, however, that c. 581 would be applied "only to future negotiations, when contracts expire subsequent to the enactment of those laws. (Exhibit "A", p. 50).

9. The Court of Appeals left open the question of whether the contract was still in effect between the parties, implicitly leaving that issue for the state courts (Exhibit "A" p. 45).

10. The MBTA has, since the Court of Appeals decision, stated to the Federal District Court that it intends to respect the terms of the Agreement between the parties (Exhibit "B") and, at the same time, that it intends to implement c. 581.

11. The MBTA has begun implementation of c. 581 by:

a) sub-contracting with Brink's Inc. for the collection of money;

b) requiring no more than one (1) guard per train on all Rapid Transit Lines commencing November 7, 1981;
c) assigning overtime at management's discretion, and not on the basis of seniority.

12. An immediate declaration as to the rights of the parties is needed because the Authority's conduct jeopardizes the plaintiffs' rights under the collective bargaining agreement by which the parties are presently operating and the Authority's actions threaten chaos in the public transportation system.

Wherefore, the plaintiff prays:

1. For a short order of notice to defendant to come into Court and show why relief hereunder should not be granted
2. For speedy completion of the pleadings and assignment of a trial date.
3. For a declaration that c. 581 of the Acts of 1980, so-called "management's rights" section, applies prospectively only to collective bargaining commenced after the effective date of c. 581 of Acts of 1980.
4. For a declaration that there is presently a contract between the plaintiff, Local Division 589, and Authority.
5. For such further relief as may be appropriate.

By its attorneys,
DiMENTO & SULLIVAN

James J. Sullivan, Jr.
100 State Street
Boston, Massachusetts 02109
(617) 523-5253

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
No. 51582

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO,

PLAINTIFF

vs. ANSWER

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,

DEFENDANT

Now comes the defendant, Massachusetts Bay Transportation Authority, and for answer to the Petition for Declaratory Relief (Complaint) states as follows:

1. The Massachusetts Bay Transportation Authority (MBTA) admits that many of its employees are members of Local Division 589 A.T.U. but denies that said union is a proper plaintiff in this action.

2. The MBTA admits the allegations in paragraph 2 of the Complaint.

3. The MBTA admits the allegations of the first sentence of paragraph 3 of the Complaint but denies the remaining allegations of said paragraph.

4. The MBTA admits the allegations of the first sentence of paragraph 4 of the Complaint but denies the remaining allegations of said paragraph.

5. The MBTA admits the allegations of the first sentence of paragraph 5 of the Complaint but denies the remaining allegations of said paragraph.

6. The MBTA admits the allegations in paragraph 6 of the Complaint.

7. As to the allegations in paragraph 7 of the Complaint, the MBTA states that the Court of Appeals decision in *Local Division 589 A.T.U.* v. *Commonwealth*, No. 81-1180 (1st Cir. Sept. 30, 1981), Exhibit A to the Complaint, speaks for itself.

8. As to the allegations in paragraph 8 of the Complaint, the MBTA states that the Court of Appeals decision in *Local Division 589 A.T.U.* v. *Commonwealth*, No. 81-1180 (1st Cir. Sept. 30, 1981), Exhibit A to the Complaint, speaks for itself.

9. As to the allegations in paragraph 9 of the Complaint, the MBTA states that the Court of Appeals decision in *Local Division 589 A.T.U.* v. *Commonwealth*, No. 81-1180 (1st Cir. Sept. 30, 1981), Exhibit A to the Complaint, speaks for itself.

10. As to the allegations in paragraph 10 of the Complaint, the MBTA states that the letter to Judge Walter Jay Skinner from the General Counsel of the MBTA, Exhibit B to the Complaint, speaks for itself.

11. As to the allegations in paragraph 11 of the Complaint, the MBTA denies the allegations in paragraphs 11a and 11c but admits the allegations in paragraph 11b.

12. As to the allegations in paragraph 12 of the Complaint, the MBTA states that said allegations are argumentative and do not require an answer.

FIRST AFFIRMATIVE DEFENSE

The purported plaintiff is a voluntary unincorporated association and cannot maintain an action in this Court pursuant to Mass. R. Civ. P. 23.2.

SECOND AFFIRMATIVE DEFENSE

The purported plaintiff is not the real party in interest pursuant to Mass. R. Civ. P. 17.

THIRD AFFIRMATIVE DEFENSE

There is a prior action pending in this Court entitled *Gallahue et al* v. *MBTA*, No. 45919 involving the same parties and the same subject matter pursuant to Mass. R. Civ. P. 12(b) (9). A true copy of the Complaint and Amended Complaint in *Gallahue* are attached hereto and marked Exhibits "1" and "2".

FOURTH AFFIRMATIVE DEFENSE

This is an action challenging the constitutionality of a state statute and the plaintiff has failed to notify the Attorney General of the Commonwealth pursuant to Mass. R. Civ. P. 24 (d).

FIFTH AFFIRMATIVE DEFENSE

The issue of the existence of a collective bargaining agreement between Local Division 589 and the MBTA is *res judicata*. *Local Division 589 A.T.U.* v. *Commonwealth*, No. 81-1180 (1st Cir. Sept. 30, 1981), at 40-45, Exhibit A to the Complaint.

SIXTH AFFIRMATIVE DEFENSE

Declaratory Judgment should be refused when such judgment, if rendered, would not terminate the controversy giving

rise to the proceeding, G.L. c. 231A § 3. Since the Court of Appeals has ruled that Chapter 581 of the Acts of 1980 can constitutionally override those provisions of the expired collective bargaining agreement between these parties that provide for indefinite or perpetual extension or renewal of the contract's terms, said Chapter 581 is effective whether or not this Court declares that the contract is still in effect. *Local Division 589 A.T.U.* v. *Commonwealth*, No. 81-1180 (1st Cir. Sept. 30, 1981), at 45-58, Exhibit A to the Complaint.

SEVENTH AFFIRMATIVE DEFENSE

The relief sought by the plaintiff is contrary to public policy as enunciated in St. 1980 c. 581.

EIGHTH AFFIRMATIVE DEFENSE

The plaintiffs have failed to state a claim upon which relief can be granted, pursuant to Mass. R. Civ. P. 12 (b) (6).

For all of the foregoing reasons, the defendant, MBTA, respectfully requests that this Court dismiss the Complaint of Local Division 589 with prejudice.

Respectfully submitted,
MASSACHUSETTS BAY
TRANSPORTATION AUTHORITY,

By its attorneys,

/s/ _____

Joseph H. Elcock
General Counsel
50 High Street
Boston, MA 02110
722-3156

/s/ _____

Ronald G. Busconi
Assistant General Counsel
50 High Street
Boston, MA 02110
722-3159

United States Court of Appeals
For the First Circuit

No. 81-1211

DAVID B. COHEN et al.,

PLAINTIFFS, APPELLANTS,

v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY et al.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[HON. JOHN J. MCNAUGHT, *U.S. District Judge*]

Before

ALDRICH, BOWNES and BREYER,
Circuit Judges.

Peter Koff for appellants.

Joseph H. Elcock, General Counsel, with whom *Ronald G. Busconi*, Assistant General Counsel, was on brief for appellee Massachusetts Bay Transportation Authority.

Richard J. Bacigalupo, Attorney, United States Department of Transportation, with whom *Trudy B. Levy*, Acting Assistant Chief Counsel, United States Department of Transportation, *Edward F. Harrington*, United States Attorney, and *Donald R. Anderson*, Assistant United States Attorney, were on brief, for Federal appellees.

April 21, 1981

ALDRICH, *Senior Circuit Judge*. This is a representative action brought by four members of the general public, riders of the "T", the rapid transit, bus, and general transit system serving metropolitan Boston operated by the principal defendant, Massachusetts Bay Transportation Authority (MBTA), a

political subdivision of the Commonwealth.[1] Other defendants are the MBTA's Chairman, the Secretary of the United States Department of Transportation, the Administrator of the Urban Mass Transportation Administration (UMTA), and UMTA's designate Regional Director for the Boston region. The suit's initial purpose was to prevent broad service cuts announced by the MBTA (in final form on March 31, 1981) from taking effect until there had been further public hearings and consideration given to matters allegedly neglected.

The complaint was filed on March 20. Plaintiffs unsuccessfully sought a temporary restraining order and a preliminary injunction from the district court, and an order or stay from us pending appeal. As a result of these failures the cuts went into effect, commencing April 4. We expedited the appeal, and after the hearing on April 8 affirmed the denial of the injunction without opinion, but retained jurisdiction for consideration of possible further relief. We now conclude that none is warranted.

The basis of the suit is plaintiffs' claim that the MBTA failed adequately to perform its obligations under an agreement entered into with the UMTA. This, in terms, followed the provisions of section 5(i)(3), 49 U.S.C. § 1604(i)(3) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601 *et seq.*, hereinafter the UMT Act or act, as a required condition for the granting of a federal Operating Assistance Grant. Funds were last received in 1980, but whether fully consumed or not does not appear. The MBTA concedes that it plans to seek further funds in 1981. We consider the agreement fully viable. Section 5(i)(3) required the MBTA to give

[1] Original plaintiffs were David B. Cohen, a member of the Massachusetts House of Representatives; George A. Bachrach, a state Senator; Richard C. Innes, an officer of the Greater Boston Group Sierra Club, and Ernest Loewenstein, a self-styled regular user. These were later joined by the Association for Public Transportation, a Mass. Gen. Laws Chapter 180 corporation, and Citizens for Participation in Political Action, a voluntary unincorporated association.

> "assurances satisfactory to the Secretary [that it] will not substantially change any service except (A) after having held public hearings or having afforded an adequate opportunity for such hearings, after adequate public notice, (B) after having given proper consideration to views and comments expressed in such hearings, and (C) after having given consideration to the effect on energy conservation, and the economic, environmental, and social impact of the change in such fare or such service."

Regulations issued under the act, so far as pertinent, stated that the notice of the public hearings should contain "a description of the contemplated service changes." 45 Fed. Reg. 26,298, 26,301 (1980) (to be codified in 49 C.F.R. § 635.9(c)(1)).

On December 30, 1980 the MBTA directors considered the actions they must take as a result of the controlling 1981 budget announced by the MBTA Advisory Board the preceding week in an amount some 57 million dollars less than requested, and 7 million dollars less than the budget which had proved substantially insufficient for calendar year 1980. After allowance for economy measures not presently before us, the shortfall was pared down to 23 million dollars. Since it is unlawful to exceed the budget, *MBTA Advisory Board* v. *MBTA*, 1981 Mass. Adv. Sh. 403, 417 N.E.2d 7, to the point that a shutdown well before the end of this year would be inescapable without changes, or additional funds, the directors concluded, in light of the shortfall, that it was advisable to consider an early reduction of services. Thereafter, on February 13, they published extensive newspaper notices listing the services proposed to be affected, by being "discontinued," by "frequency reduction," or by elimination of service on Sundays, or during off-peak hours, or beyond stated geographical limits.[2] Following this listing was an announce-

[2] According to plaintiffs' summary of the cuts implemented on April 4, services on some 180, or virtually all, bus routes were reduced in frequency and

ment that four public hearings would be held on March 16, 1981, at certain specified hours and places, and that more detailed information would be provided at the hearings.

Present at each of the March 16 hearings were MBTA representatives, one of whom, in advance of a verbatim transcription, took notes and made summaries of the general nature of the comments. These summaries were forwarded to the MBTA directors before their vote, and were part of the district court record. The vote, taken March 31, 1981, recited that the testimony adduced at the hearings had been reviewed, and that "despite the adverse effects on the public resulting in hardship and substantial inconvenience and the adverse impact upon the energy, economy, environment and social well being," the Board's legal obligation to live within its budget mandated implementation of the cuts.

As the transcripts are not before us we cannot finally evaluate plaintiffs' generalized assertion that the summaries were not adequate or meaningful, but an extraordinary amount of substance was omitted if they are materially incomplete. Most of the comments, as summarized, focused on the hardships imposed by the cuts and, somewhat less so, on who was to blame. Such suggestions as appear, range from that of a state senator, echoed by a Union representative, that the MBTA "carry on the service substantially as it exists and face the issue of exhaustion of funds when it arises," to undetailed admonitions to "cut the fat" and "live within the budget."

The most specific proposals came from the MBTA's former director, Robert Kiley, whose suggestion that all MBTA employees take an 8% to 10% cut in pay was recorded in the summaries, along with the predictable Union opposition. Kiley also offered, by affidavit, his opinion

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hours of operation; all services were discontinued on 21 bus routes, and Sunday services cancelled on 30 more. Sunday rapid transit service was reduced by 2½ hours.

> "that the MBTA could reduce its remaining 1981 expenditures by approximately $7,250,000 *without reducing service* simply by reducing the following costs in four areas: (1) absenteeism ($3,000,000); (2) replacement of employees lost through attrition ($750,000); (3) overtime ($2,000,000); and (4) the pool of workers covering absent employees, the so-called 'cover list' ($1,500,000)."

Opinions may differ as to the tractability of the problems identified, but the proposed 7 million dollar saving still falls considerably short of the 23 million dollar shortfall. In short, if there is a "quick fix" for the MBTA's problems, it does not appear on this record.

In an extensive opinion the district court found that plaintiffs had not met the familiar requirements for the granting of a preliminary injunction, namely, that they would suffer irreparable injury if the injunction were not granted; that the injury to them outweighs the anticipated injury to the MBTA should the injunction issue; that they have a reasonable likelihood of success, and that granting the injunction would not be against the public interest. *See Planned Parenthood League of Massachusetts* v. *Bellotti*, 1 Cir., 1981, 641 F.2d 1006, 1009.

The court concentrated its attention on the likelihood of success, but added that the issuance of an injunction "will do great harm to the defendant MBTA." We follow the same course, although our reasons for doubting success are not all the same as those of the district court.

Plaintiffs posited their right to sue primarily on the ground that this was implicit in the terms of section 5(i)(3), the regulations thereunder, and the MBTA's acceptance of the grant agreement. Their other three grounds were fallback positions. Since we agree with the first, we need go no further.[3] Plain-

[3] Plaintiffs also asserted claims under 42 U.S.C. § 1983, *see Maine* v. *Thiboutot*, U.S. (6/25/80); *Id.*, slip op. at 27 (Powell, J., dissenting), under Mass. G.L.c. 161A § 5(a), and, against the federal defendants, for violation of their supposed duty under various sections "to take appropriate action to protect the public" from violations of the UMT Act. The first and

tiffs' right to sue follows almost directly from our decision in *Local Division No. 714, Amalgamated Transit Union, AFL-CIO* v. *Greater Portland Transit District*, 1 Cir., 1978, 589 F.2d 1. Defendants seek to distinguish that case chiefly by arguing that a member of the riding public is not "one of the class for whose *especial* benefit the statute was enacted," 589 F.2d at 14, quoting *Cort* v. *Ash*, 1975, 422 U.S. 66, 78. Granted, in the present action the riding public comprises thousands of potential plaintiffs, as opposed to the single union in *Greater Portland*.[4] We do not, however, read the "especial benefit" prong of the *Cort* test as embodying a numerical inquiry, but only as requiring that the plaintiff and his class be the intended, primary beneficiaries. It cannot be gainsaid that the purpose of the requirement of a hearing before fare or substantial service changes is to benefit the consuming public by promoting informed decision-making. The fact that the benefitted class is a large one does not mean that there is none, or that plaintiffs are outside it. Once this point is made, this case is indistinguishable from *Greater Portland*. We see no need to deal with defendants' further objections, such as the fact that other sections of the act, *e.g.*, sections 1604(m), 1606, 1612 and 1615, are directed to more limited classes.

At the same time that we construe the act as giving legally enforceable rights to the public, we must interpret those rights so as to give the statute practical effect. The sheer number of concerned users must necessarily dilute individual interests.

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last are mooted by our holding that plaintiffs may prosecute their claim under the UMT Act and by our holding on the merits of that claim, respectively. As for the state claim, if a private right of action is to be fashioned in plaintiffs' favor from section 5(a)'s general admonition to the MBTA to act "in the public interest . . .", we do not think we are the appropriate court to do so.

[4] We may suspect, however, that as a practical matter the present suit will end the controversy. Since only general, unitary injunctive relief is (or, we think, could be) called for, a judgment in plaintiffs' favor would leave no incentive for others to pursue the matter further. Should the action be terminated adversely to plaintiffs, *stare decisis* may be just as inhibiting as *res judicata*.

The hearing and proper consideration of the views of the whole riding public calls for discretion in choosing the method and, very possibly, a broader brush than may satisfy some. It cannot be thought that every rider who wishes to be heard, and to have his or her views "properly considered" by the Board, can call upon the federal court to police the process, and to review it to the last minutiae. Our maximum function must be to inquire as to the general adequacy of the hearings,[5] and second, whether the views expressed were adequately transmitted to the Board and were before it at the time of its vote. In both inquiries the focus is on the reasonableness under the circumstances of the means chosen to accomplish these ends.[6] These circumstances include the complexity of the proposed changes, the necessity for prompt action, the putative size of the audience and the number of speakers. On the facts of this case plaintiffs have a singularly difficult row to hoe. We may deal briefly with their objections.

Plaintiffs first complain that the notices of the hearings, in listing changes in individual bus route services simply as "frequency reduction," and not specifying the exact reduction until the time of the hearings, unduly limited the efficacy of individual complainants.[7] We can only think that a requirement

[5] Having in mind, also, that, as appears from the record, and representations of counsel, there have been other means availed of for public input. *Cf. Main-Amherst Business Ass'n, Inc.* v. *Adams*, W.D.N.Y., 1978, 461 F. Supp. 1077, 1084.

[6] Plaintiffs' proposed analogy to the National Environmental Policy Act of 1969 is instructive. A comparison of the UMT Act's "hearing and notice" provision in section 5(i)(3) with the much more detailed requirements of NEPA, 42 U.S.C. § 4332, suggests that while there is a common purpose — informed consideration of the consequences of proposed action — a different level of formality was contemplated.

[7] It is true that the preamble to the regulations, although not the regulations themselves, so indicates.

> "For example, if the service change provides that a bus will run every 30 minutes rather than every 15 minutes then this fact would appear in the notice". 45 Fed. Reg. 26,298, 26,300 (1980).

that every change be worked out, and announced, in advance to the last detail in an emergency such as this would serve to drown the baby rather than give it a bath. While plaintiffs claim that not being fully informed until the time of the hearing prevented their making an intelligent presentation, we may doubt that the district court will find, indeed, even could find, prejudice from the lack of greater specificity in the notice.

Plaintiffs' complaint that the MBTA directors were not personally present at the hearings, and that the summaries furnished them by their representatives could not be sufficiently meaningful to have permitted them to afford adequate consideration, we have already dealt with. To it, however, they join the familiar argument that the directors having announced in advance what they proposed to do, "the subsequent hearings were little more than a hollow exercise." Although the necessity for taking further advance procedures, particularly the affording of drivers their "pick" of runs, puts more flesh on this tired skeleton than usually exists in the heads-I-win-tails-you-lose attack on a statutory procedure that requires the giving of notice of a proposed action in advance of the hearing, it is not enough to give it prima facie life.[8]

Finally, although the directors recited in their vote that they had given attention to the social, economic and environmental consequences of substantial service reductions, plaintiffs would have it that the plaintiffs must prevail on this issue in the absence of further evidence. Indeed, throughout their brief, plaintiffs take the position that the court was bound to

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It is also true that such listing of the present frequency changes, which varied for each of some 180 routes and in seven different time periods (listed as AM, Midday, PM, 8-10, Late Eve., Sat., Sun.) would have been considerably more voluminous than the example suggests.

[8] Plaintiffs' argument that the directors were committed by the "pick" prior to the hearing is belied by the fact that a postponement of the initially proposed date was made after the hearings in order to effect a new pick as a result of changes that were made.

accept the correctness of their factual contentions in the absence of rebuttal evidence. We do not agree. While a court, in the exercise of its discretion, may take a verified complaint, affidavits, or even, in some circumstances, representations of counsel, *see* 7 Moore's Federal Practice ¶ 65.04[3] (1980), this is a long way from saying that it has to do so. This is particularly so with respect to conclusory allegations manifestly outside the pleader's or affiant's personal knowledge, or even his reliable hearsay knowledge.[9] *Cf. Marshall Durbin Farms, Inc.* v. *National Farmers Organization, Inc.*, 5 Cir., 1971, 446 F.2d 353, 357. Plaintiffs have not met the heavy burden of overcoming the court's conclusions that

> "nothing has been presented to me that satisfies me there is a reasonable prospect of establishing a refusal on the part of MBTA to consider views propounded by members of the public at the hearing in March. Nor, has anything been submitted which shows reasonable prospect of establishing that the MBTA did not consider the potential effect of the desired reductions on energy conservation, economic, environmental and social matters."

This case, as do many such, calls for consideration of the factual background. It is a matter both of evidence, and of common knowledge, that the MBTA faces substantial financial difficulties, with anticipated expenses considerably in excess of available funds. The service cuts were proposed as a way of reducing the anticipated deficit. Plaintiffs, so far as appears, proposed no viable alternatives. The offered predictions of certain legislative leaders that the legislature would come to the MBTA's rescue, we may take judicial notice from past history, were nothing to be counted on. See, in general, *MBTA Advisory Board* v. *MBTA*, 1981 Mass. Adv. Sh. 403, 417

[9] *E.g.*, see ¶ 56 of the amended complaint, that "[t]he MBTA has violated the assurances . . . by failing to consider the views and comments expressed in [the March 16] hearing; and by failing to consider the effects of [the service] reductions on energy conservation and the economic, environmental, and social impacts thereof."

N.E.2d 7. Rather, this case may have looked to the directors as another example of what the courts themselves are now seeing frequently in the wake of Proposition 2½, another King Canute exercise in the face of an inexorable tide.[10] The district court was warranted in concluding that a postponement of the cuts until after a further hearing, disturbing as they certainly are to the public, would not likely result in, or warrant, any changes the benefits of which would outweigh the injury that a postponement would occasion.

Affirmed.

[10] This comparison is perhaps ill chosen, for what is being witnessed is the supply of funds running out rather than the tide flowing in, but it is equally true that the King could not have avoided being left high and dry.

ARBITRATION AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

AND

DIVISION 589, AMALGAMATED TRANSIT UNION

THE UNDERSIGNED IMPARTIAL UMPIRE, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and having duly heard and considered the proofs and allegations of the Parties, hereby AWARDS that:

> The July 10, 1978 amendments to Section 19 of Chapter 161A of the General Laws, and the M.B.T.A.'s insistence on arbitrating interest disputes pursuant to those amendments, constitutes a conflict with the pre-existing 13(C) Agreements executed by the parties.

/s/ _____

DATED: August 13, 1979.
BOSTON, MASSACHUSETTS

WILLIAM J. FALLON
IMPARTIAL UMPIRE

ARBITRATION DECISION

DISPUTE RE:
13(C) AGREEMENT

DATE OF AWARD: AUG. 13, 1979

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

and

DIVISION 589, AMALGAMATED TRANSIT UNION

This matter was presented to the undersigned Arbitrator at hearings held in Boston, Massachusetts, on March 23 and May 3, 1979. At the hearings Joseph A. Emerson, Esq., Morgan, Brown, Kearns and Joy, One Boston Place, Boston, Mass., and Robert J. Lewis, Esq., appeared for the Authority; and I. J. Gromfine, Esq., and Douglas Taylor, Esq., Gromfine and Sternstein, 1200 Fifteenth Street, N.W., Washington, D.C., represented the Union.

Post-hearing briefs were submitted on behalf of both parties and were received by the Arbitrator on June 25, 1979.

From the suggestions of counsel and the record as a whole, the issue is determined to be:

> Whether the 1978 Amendments to Chapter 161A of the General Laws and the insistence of the MBTA in arbitrating interests disputes in accordance with those amendments, are in conflict with the 13(C) Agreements of the parties?

ANALYSIS

The collective bargaining agreement expired on December 31, 1977. The parties attempts to negotiate a new agreement continued into May 1978 without success. On May 5, 1978 Richard J. Guiney, Recording Secretary of Division 589, wrote to Authority Chairman Kiley invoking arbitration. In pertinent part his letter read:

> — In view of the Authority's position, it is apparent that the parties will not be able to reach agreement on the terms of a new contract. Accordingly, pursuant to Section 601 of the existing agreement, notice is hereby given that the issues in dispute between us be submitted to a Board of Arbitration to be selected in accordance with the provisions of Section 103 of the agreement.
>
> The Union designates, as its representative on the Board of Arbitration, Mr. I. J. Gromfine of 1200 15th St., N.W., Washington, D.C., reserving the right to substitute for Mr. Gromfine in the event he is unable or unwilling to serve or continue to serve prior to the issuance of an Award. (Union Ex. 11)

On May 11, 1978, Kiley replied to Guiney, agreeing to proceed to arbitration and naming Allan W. Drachman, Esq., as Authority representative on the Arbitration Board, but reserving the Authority's rights as follows:

> — There is currently before the General Court, Senate Bill #1510 relating to the M.B.T.A. arbitration process which, if enacted into law, will create rights and duties affecting the methods of conducting arbitrations. The Authority is willing to proceed in accordance with your letter but any action it takes thereunder must be taken in light of this legislation.
>
> In the event that this legislation is enacted into law and becomes effective, the Authority expressly reserves whatever rights it may have under such statute, and specifically does not waive such rights.
>
> Subject to the foregoing, the Authority designates as its representative in this matter Allan W. Drachman, Esq., 185 Devonshire Street, Boston, Massachusetts, 02110, reserving the right of substitution and re-substitution. (Union Ex. #12).

In the ensuing days correspondence was exchanged between Mr. Drachman and Messrs. Sternstein and Gromfine, about requesting a list of five arbitrators (experienced in transportation) from the American Arbitration Association. After written request to the AAA was made, Drachman wrote to AAA Regional Director Reilly on July 5, 1978 noting that pending legislation required the arbitrator to be a legal resident of the Commonwealth of Massachusetts, and experienced in state and local finance. He requested that Reilly keep this in mind when formulating the panel.

Mr. Reilly requested Gromfine's comments on Drachman's July 5th letter, and Gromfine replied to the effect that Reilly had no right to consider conditions imposed by pending legislation and that the arbitration was commenced and should proceed in accord with Section 103 of the Agreement.

On July 13, 1978 the Governor of Massachusetts signed into law Chapter 405 of the Acts of 1978. On July 20, 1978, Warren J. Higgins, Acting Chief Executive Officer of the MBTA wrote to Recording Secretary Richard J. Guiney of Division 589, noting the enactment of Chapter 405 and stating that the

Authority therefore withdraws its designation of Allan Drachman as Authority Arbitrator and desires to proceed to mediation as provided in the newly enacted General Laws, Chapter 161A, Section 19D.

On July 25, 1978, Mr. Guiney replied to the request of Higgins, noting that counsel for the Union needed time to study the recently enacted legislation and to determine what position to take in respect to the arbitration already in progress. Guiney stated that he hoped the study would be completed shortly and as soon as it was he would respond directly to Higgins' request for mediation. (Union Ex. #26).

On August 28, 1978 Kiley wrote to Guiney advising that if no agreement was reached on a mediator on or before September 8, 1978, the Authority would petition the Board of Conciliation and Arbitration to appoint a Mediator pursuant to Chapter 161A, Section 19D. (Union Ex. #27).

On September 6, 1978 Guiney wrote to Kiley observing that the Union was convinced certain portions of the 1978 amendments to Section 19 of Chapter 161A of the General Laws violated important constitutional rights of Local 589 and its members, but those portions of the new law dealing with mediation were not objectionable, and the Union was willing to submit to mediation provided:

> In so doing we intend in no way to concede that the portion of the amendments which establishes arbitration procedures and standards in conflict with our labor agreement and 13(c) agreements is constitutional. (Union Ex. #20).

Meanwhile on June 1, 1979, D. V. Maroney, Jr., International President of the Amalgamated Transit Union, wrote to Secretary of Labor, Ray F. Marshall, expressing concern about the serious potential conflict between the provisions of Section 13(C) of Urban Mass. Transportation Act, as amended (49 U.S.C. 1609 (c)) and the provisions of Massachusetts Senate Bill No. 1510, which had been passed by the Senate and was then awaiting action by the House. Maroney contended that:

> — The bill, in its present form, as attached hereto, enacted into law, would render the MBTA unable to comply with currently valid and binding S13(C) commitments to arbitrate and to preserve existing collective bargaining

and arbitration rights as provided by presently applicable state law and labor agreements.

These contractual commitments to arbitrate are contained in employee protective arrangements which have been certified by the Department of Labor as "fair and equitable" and made part of each and every contract of assistance for all MBTA projects funded under the Act during the 14 years of its existence. Close to $1 billion in federal subsidies have been awarded to the MBTA on the basis of these S 13(C) conditions.

The issue squarely presented by the bill is whether these commitments, solemnly given as a condition of receiving federal transit funding, may, while still in full force and effect, be rendered invalid and unenforceable by subsequently enacted state law. — (Union Ex. #30).

Secretary Marshall responded to Maroney's letter on June 27, 1978, stating that he asked Assistant Secretary of Labor, Francis Burkhardt, to undertake a complete review of the matter if Senate Bill No. 1510 was enacted.

Following enactment of Senate Bill No. 1510 on July 13, 1978, Burkhardt undertook a review of the matter. On Sep-

tember 12, 1978 he wrote to Maroney, (with a copy to Kiley) in relevant part as follows:

> — At issue is whether the interest arbitration provisions of the new state law are in conflict with the existing Section 13(C) arrangements entered into by the ATU and MBTA and certified by the Department of Labor. —

Burkhardt noted that the Secretary of Labor was not authorized to resolve disputes over the interpretation, application or enforcement of the 13(C) arrangement, but that paragraph (13A) of the December 10, 1974, 13(C) agreement between the MBTA and the ATU, provides for arbitration of any such dispute. He urged the parties to make every effort to reach agreement, or to invoke the arbitration procedures of the 13(C) Agreement.

On September 22, 1978, Division 589 Recording Secretary Guiney wrote to Kiley invoking the arbitration procedure outlined in Section 104C. 9. of the Collective Bargaining Agreement which is incorporated by reference in Section 13 of the December 10, 1974, 13(C) Agreement. Guiney also noted that the arbitration over the new law's conflict with the 13(C) Agreement should not delay or interfere with any mediated bargaining the Union had agreed to begin. (Union Ex. 33).

On October 13, 1978, Kiley replied to Guiney that he was unaware of any direct discussions or communications between the MBTA and Division 589 about an interpretation of the 13(C) Agreement prior to Guiney's letter of September 22, 1978. He requested information about the dispute and suggested that the invocation of arbitration was premature. (Union Ex. 35).

Guiney replied to Kiley on October 31, 1978 stating, inter alia:

— As we indicated in our letters of September 6 and 29 of this year, Local 589 does not believe that those portions of the new law which require mediation, by themselves, impair the constitutional rights of our members. Similarly the new mediation requirement does not constitute a substantial impairment of our 13(C) Agreement, in the view of Local 589. However, each and every remaining section of the new law does impair rights guaranteed by the existing 13(C) Agreements. Specifically (for purposes of clarity we refer to the Agreement executed in 1974), Sections 2, 3(a), 3(b), 4, and 13 are impaired by operation of the 1978 Amendments to Chapter 161A, in that the new law purports to alter the number of arbitrators which may be designated to decide an interest arbitration dispute, the method of selecting a neutral arbitrator, the evidence he may consider, the weight he may attach thereto, and the devices he may use in fashioning an award. All of the foregoing modifications of our arbitration procedures, viewed separately or as a whole, are substantial impairments of the rights of members of Local 589 under the 13(C) Agreements. — (Union Ex. 36).

Subsequent MBTA applications for federal grants for various projects were certified by the Department of Labor noting that:

— It is recognized that depending on the resolution of the current controversy, there may be the need for further action by the parties and/or the Department of Labor regarding the existing 13(C) arrangement.

In the interim, however, certification shall be without prejudice to, or waiver of, any of the rights and remedies of the parties and shall not be taken as affecting the ap-

propriate disposition of these issues in any forum. (Union Exs. 40, 40A, 40B, & 41).

POSITION OF THE UNION

The Union contends that the arbitration procedures invoked for the purpose of obtaining a successor agreement to the one which expired on December 31, 1977, were interrupted by the MBTA acting under a new Massachusetts statute. Further, the Department of Labor suggested this arbitration as a first step in establishing the proper interests arbitration procedure to be followed; whether under the new state statute, or, pursuant to Sections 601, 100 and 103 of the Agreement which expired on December 31, 1977.

The Union maintains that there is no basis for the Authority's claim that this arbitration is premature. The fact that the Department of Labor urged it, is sufficient to dispose of that claim. Moreover, the MBTA Chairman stated prior to the passage of new statute that it was the MBTA's intention to follow the provisions of the amendments, and this was repeated many times following passage of the amendments.

The Union argues that Chapter 161A, Section 29, makes it clear that the MBTA is authorized to continue the interests arbitration pursuant to the Agreement rather than the amended law if it is obliged to do so in order to continue to receive federal funding; to wit:

> It is the intent of this section that the provisions of any federal law, administrative regulation or practice governing federal assistance for the purpose of this chapter shall, to the extent necessary to enable the commonwealth or its subdivision to receive such assistance and not constitutionally prohibited, override any inconsistent provisions of this chapter. (Union Ex. 48, Authority Ex. 3, S. 29).

The Union submits that the December 10, 1974 13(C) Agreement guarantees the continuation of arbitration in accordance with the arbitration provisions in the Agreement between the MBTA and Local 589. The 13(C) Agreement preserved the interest arbitration procedures refined over the years and followed for generations by the parties as an alternative to economic warfare. The employees have no lawful right to strike. They agreed to a tripartite Board of Arbitration, chaired by a professional arbitrator experienced in transportation, with full opportunity to place in evidence such evidence and to argue such criteria as either party deemed appropriate. Section 4 of the December 10, 1974, 13(C) Agreement, states in relevant part:

> The collective bargaining rights of employees of the Authority represented by Labor Organizations signatory hereto including the right to arbitrate labor disputes and to maintain Union security and check-off arrangements, to the extent such are provided for by applicable laws and/or existing collective bargaining agreements, or otherwise shall be preserved and continued.

The Authority appears to argue that the rights of employees guaranteed by 13(C) are only preserved to the extent that the Massachusetts legislature chooses to continue them. It follows therefore that if a statute had been enacted in 1978 taking away all rights to bargain collectively or to arbitrate disputes, and the MBTA had broken off negotiations in compliance therewith, that such action would not have been inconsistent with the 13(C) Agreement.

Merely to state that contention is to expose its patent fallaciousness. Moreover, it ignores the fact that the "applicable laws" reference in Section 4 was inserted only to cover situa-

tions where no existing collective bargaining agreement provided for arbitration, and where there was a contract arbitration provision, it was controling and must be preserved if different from applicable laws.

The MBTA negotiated the 13(C) Agreement as a State entity having a direct interest in obtaining federal funding. The MBTA was the agent of the State and authorized by Section 29 of Chapter 161A to make *any* guarantee necessary to obtain federal funding. In this context it is not conceivable that Local 589 would agree to, let alone propose a 13(C) Agreement (Authority Ex. 6), that would allow the State to be free to wipe out the Union's rights to collective bargaining and interest arbitration as then set forth in its labor agreement.

It is equally inconceivable that the Secretary of Labor would have certified Section 4 of the 13(C) Agreement as having met the requirements of the UMTA, if Section 4 permitted the interpretation given to it by the Authority. The plain and clear meaning of the December 10, 1974, 13(C) Agreement is to assure the kind of interest arbitration then existing in the collective bargaining agreement, unless and until it was changed by negotiations or arbitration.

The interest arbitration provisions of the new law represent a clear and serious impairment of the interest arbitration provisions in the collective bargaining Agreement, which were preserved and protected by the 13(C) Agreement. For one, there is an inherent impairment in regulating interest arbitration by statute rather than by contract. If contract arbitration is unworkable or unfair the parties can change it. Not so, with interest arbitration regulated by statute.

The new statute requires a single arbitrator instead of the tripartite board that has been an integral part of the process since at least 1920. Interest arbitration is an extension of the collective bargaining process, and not an adversary proceeding in the usual sense. If the process is to survive as a viable alternative to economic warfare it must have a reasonable measure

of acceptability to both sides. It is vitally important to have a tripartite process so the neutral arbitrator can learn in executive sessions the depth of commitment each side has to the various issues, and to allow the partisan arbitrators to become intimately involved in the execution of an award which will be the basis of their relationship for the upcoming years.

Irreparable injury is done to the process by the elimination of the tripartite board, and in a most fundamental respect the new statute conflicts with the 13(C) Agreement which preserves the continuation of tripartite board.

Under the labor agreement the neutral arbitrator is selected from a list from the American Arbitration Association of arbitrators "experienced in transportation." Under the new law the arbitrator must be a legal resident of Massachusetts and experienced in state and local finance.

The Union submits that there are few if any legal residents of Massachusetts who are experienced in state and local finance, and qualified by training and experience to handle a complex interest arbitration case in the transit industry. The obvious purpose of this portion of the new law is to limit the selection of a neutral to persons with no experience in transit arbitration, who may be more influenced by local political pressures, and likely to give disproportionate weight to management's claims about the impact on the tax structure of increases in labor costs. There is a diminished likelihood that a neutral will be selected who can give the Union a fair shake, and here again the new statute is in direct conflict with the negotiated interest arbitration provisions which the 13(C) Agreement was designed to protect.

The Union maintains that the stated criteria of the new law, which are a required guide for the arbitrator, are biased in favor of management and ignore the traditional criteria followed by arbitrators in transit arbitrations. The collective bargaining Agreement imposes no criteria to bind the tripartite

board. Both sides are free to introduce whatever criteria it wishes, and the board is free to give such weight to the criteria as it deserves. Under the new law the arbitrator must consider each criterion separately and report his conclusion in respect to each one. Moreover, the arbitrator is required to rely primarily on certain factors such as financial ability to pay, including the statutory requirement of advisory board approval of the Authority's budget, the financial ability of the Commonwealth and individual communities, the overall compensation of employees including vacations, holidays and other pay for time not worked, together with all fringe benefits, and a comparison of wages, hours and conditions with other employees performing similar services within the Commonwealth, and other employees generally in public and private employment within the Commonwealth.

While the factors of change in the cost of living, hazards of employment, and changes in other factors during the pendancy of the arbitration are neutral, the remaining five factors are all biased in favor of management. Excluded from consideration are a comparison of private employees including those engaged in transportation work, and transit employees in other states. Management has tried in arbitrations to obtain the kind of restrictions and mandatory guidelines provided by the statute, and it has usually failed to accomplish this.

The problem is that management's arguments are now listed in the statute as mandatory criteria to be considered and reported on by the arbitrator, while the Union's arguments are given no commensurate status. The overall affect is to advantage the M.B.T.A. in any interest arbitration and to disadvantage the employees.

Under the new law an arbitrator is prohibited from making an award which contains any provision for salary adjustments after the expiration of the contract period covered by the award. When the 13(C) agreement was negotiated in 1974

the collective bargaining agreement contained a cost of living "roll-over" provision. Section 3(a) of the 13(c) Agreement assured that this benefit would be preserved, and the new law's prohibition of such a benefit presents a serious conflict with the 13(C) Agreement.

The Union also points out that in its 1979 Budget Committee Report the M.B.T.A. Advisory Board flatly asserted that:

> Under the new arbitration law an arbitrator will be compelled to refuse to grant any increase in wages and benefits for 1979, and therefore the Advisory Board does not wish to allow any funds for wage increases in the 1979 M.B.T.A. budget. (Union Ex. 45).

For all of these reasons, the Arbitrator should rule that the new law, and management's insistence on arbitrating interest disputes in accordance with its terms, instead of the terms of the collective bargaining agreement, constitutes a conflict with the provisions of the existing 13(C) Agreements negotiated by the parties.

POSITION OF THE AUTHORITY

There is a "legislative scheme" here that began with Chapter 544 of the Acts of 1947 wherein the predecessor of the M.B.T.A., The Metropolitan Transit Authority, was established as a "body politic and corporate and a political subdivision of the Commonwealth." The "scheme" was continued in 1964 by Chapter 563 of the Acts of 1964, whereby the Massachusetts Bay Transportation Authority was created.

In 1947 the M.T.A. acquired all the assets of the Boston Elevated Railway Company, a private corporation, and by Chap-

ter 544 the transit company became publicly owned. Section 19 of Chapter 544 of the Acts of 1947 conferred upon the Authority the right to bargain collectively with its employees and the right to arbitrate disputes. This was the first time in history that public employees in the Commonwealth were given the right to bargain collectively, and it was two decades before the Massachusetts legislature authorized other public bodies to enter into collective bargaining relationships with Labor Organizations. If it had not been for the specific grant of authority in Chapter 544 of the Acts of 1947, there would have been no collective bargaining or arbitration of interests disputes at the M.T.A.

Chapter 563 of the Acts of 1964 continued the right of employees to bargain collectively and to arbitrate interests disputes with the M.B.T.A. The "legislative scheme" continued to be refined by the amendments enacted on July 13, 1978 which were forged to balance the rights and responsibilities of the M.B.T.A. and the labor organizations with which it bargains.

Unlike other public bodies, all of the "legislative scheme" covering labor relations within the M.B.T.A. is set forth in one statutory provision — Section 19 of Chapter 161A. This then is the applicable law affecting the obligation to bargain and the right to arbitrate disputes.

In 1964 the Congress of the United States enacted the Urban Mass Transportation Act, which provides a vehicle for federal funds to the states for transportation purposes. Among its provisions was the so-called Section 13(C) which treated with labor protective arrangements. Pursuant to the UMTA, the Authority and the Union entered into a series of 13(C) agreements which provided the agreed upon labor protective arrangements on which the Secretary of Labor based his certification that Section 13(C) had been complied with. Until the July 13, 1978 passage by the Massachusetts legislature of

Chapter 405 of the Acts of 1978, there had been no dispute over the meaning of the December 10, 1974, 13(C) Agreement.

The Authority submits that there is no evidence before this arbitrator of any violation by the Authority of the 13(C) Agreement. There has been no unilateral change in wages or benefits, and no interruption of benefit payments. The Authority has not refused to arbitrate interest disputes. It has complied with paragraph 4 of the 13(C) Agreement by proceeding, with the reluctant concurrence of the Union, through the initial mediation step of the "legislative scheme" relative to interest arbitration, thereby respecting the paragraph 4 language guaranteeing the:

> — right to arbitrate any labor dispute
> — as provided in applicable laws and/or the existing collective bargaining agreement.

The Authority's position is that if interest arbitration is to proceed, then it must conform to the provisions of Section 19(C) et seq. of Chapter 161A of the Massachusetts General Laws. Interest arbitration must conform to the "legislative scheme" set forth in Chapter 161A.

The December 10, 1974, 13(C) Agreement which binds the Authority and the Union, provides in paragraph 4 that:

> The collective bargaining rights of employees of the Authority represented by Labor Organizations signatory hereto including the right to arbitrate labor disputes and to maintain Union security and check-off arrangements to the extent such are provided for by applicable laws and/or existing collective bargaining agreements, or otherwise shall be preserved and continued.

All of the preceding 13(C) Agreements contain similar language refering to the right to arbitrate *as provided in applicable laws*. Even the Union's draft of the proposed 13(C) agreement in late 1974 contained such language:

> — including the right to arbitrate labor disputes . . . as provided by applicable laws
> — (Authority #6).

The Authority submits that it is willing to arbitrate interest disputes in accordance with "applicable laws" — to wit: Chapter 161A, Section 19c et seq. of the M.G.L. This is entirely consistent with Section 4 of the December 10, 1974 13(C) Agreement.

In 1970 in a case decided by the Supreme Judicial Court involving the M.B.T.A. and the State Labor Relations Commission (356 Mass. 563), Justice Cutter wrote that the Commission had no jurisdiction over the Authority because no statute granted such jurisdiction. Such jurisdiction was not then part of the "legislative scheme" for the labor relations of the Authority. The legislature thereafter changed the "legislative scheme" and placed the Authority under the jurisdiction of the Labor Relations Commission. (Chapter 514 of the Acts of 1970 amended Chapter 161A and inserted Section 19A). Thus, unless the Authority is authorized by the legislature to perform some function, as a political subdivision of the Commonwealth, it may not act independently.

The Authority concludes that the phrase "applicable laws" as it appears in paragraph 4 of the December 10, 1974, (13(C) Agreement, must mean the provisions of Chapter 161A, Section 19, authorizing the conditions under which the Authority may arbitrate disputes. Moreover, the Union has agreed with this interpretation in the past. International President Mar-

oney in his letter to Secretary of Labor Marshall while arguing that Chapter 405 of the Acts of 1978 conflicts with the 13(C) Agreement, acknowledged the applicability of state laws. In the first paragraph of that letter he stated:

> . . . The bill . . . would render the MBTA unable to comply with currently valid and binding 13(C) commitments to arbitrate . . . as provided by presently existing state law . . . (Union Ex. 30).

Also, in the May 17, 1979 letter of Attorney Herman Sternstein to Allan Drachman, Esq., it was stated:

> Finally the Authority raised the problem of pending legislation. It is agreed that in proceeding that way, the parties are acting in accordance with the law and contract as they now apply. If and when a new statute becomes the law, as a result of which the rights and obligations of the parties are changed, the parties intend to abide by the law which applies. (Union Ex. 13).

The Authority maintains that the Arbitrator should not undertake an analysis and interpretation of Chapter 405 of the Acts of 1978, for that is the responsibility of the Courts. The Arbitrator derives his authority from the intent of the parties as reflected in the collective bargaining agreement. His role is to interpret the provisions of that agreement, and in so doing there should be no resort to external law. In *Steelworkers* v. *Enterprise Wheel and Car Corp.*, 34 LA 570, the Supreme Court stated:

— An arbitrator is confined to interpretation and application of the collective bargaining agreement.

In *Steelworkers* v. *Warrior Navigation Co.*, 34 LA 564, the Court stated:

> Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.

The Authority argues that here the 13(C) Agreement of December 10, 1974 is the essence of the arbitrator's authority and his decision must confine itself to interpreting that agreement only. The arbitration provision of that agreement in paragraph 13(b) states the authority of the arbitrator, and it does not give him any right to determine whether a conflict exists between a state and federal law, or whether a state law is unconstitutional, or what interpretation should be given a state statute. Nowhere does the 13(C) Agreement confer jurisdiction on the arbitrator to interpret and apply external law. In a similar context, the U.S. Supreme Court defined the role of arbitration in a case dealing with Title VII of the Civil Rights Act of 1964. In *Alexander* v. *Gardner-Denver Co.* 415 U.S. 36 (1974), the Court said:

> . . . As the proctor of the bargain the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective bargaining agreement, and he must interpret and apply that agreement in accordance with "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that

> conflict with the bargain of the parties . . . If an arbitral decision is based "solely on the arbitrator's view of the requirements of enacted legislation rather than on an interpretation of the collective bargaining agreement, the arbitrator has exceeded the scope of his submission" and the award cannot be enforced . . .

In deciding the issue suggested by the Union, the Authority submits that the arbitrator cannot avoid ruling on, or interpreting Massachusetts statutory law, for the Union is really grieving an act of the legislature rather than an act of the Authority. The Authority contends that the Court is the proper forum to contest an act of the legislature. Further, for the arbitrator to rule as requested by the Union would result in holding that the Authority must ignore state law. The Union suggested that by invoking Section 29 of Chapter 161A the Authority could disregard the 1978 amendments to Section 19. This assumes that the legislature gave the Authority the right to pick and choose which provisions of the enabling legislation it would follow, and the Authority believes that such an assumption is unwarranted. Where Sections 19C through 19G were added to Chapter 161A some 14 years after the original act, knowing full well the provisions of Section 29, the legislature obviously believed that there was nothing inconsistent with these amendments.

It is the further position of the Authority that the controversy raised by the Union does not come within the purview of the 13(C) Agreement. The 13(C) Agreement requires a nexus to be made between the interests of the employees subject to protection, *as affected by assistance to the project*. The Union has failed to show any connection between this controversy and the federal assistance to any project of the Authority. The 13(C) Agreement wasn't intended to give the parties the right

to arbitrate *any* disputes but only those which are traceable to federal assistance. An act of the legislature is not the kind of controversy intended to be covered because there is no connection between that act and the receipt of federal funds.

The Authority also notes that the employees have had a legislative right to bargain collectively and arbitrate disputes for some 17 years prior to the enactment of the Urban Mass Transportation Act of 1964. The fact that a political subdivision of the Commonwealth is receiving federal assistance should not be a bar to the Commonwealth's amending a statute it has long had a right to amend. In *National League of Cities* v. *Usery*, 426 U.S. at 855, the Court said:

> One undoubted attribute of state soverignty . . . is the states power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental function.

Consistent with this decision, a state must also be able to establish arbitration procedures for its employees.

The Massachusetts legislature was not a party to the 13(C) Agreement and therefore it did not voluntarily give up the right to amend a statute it had previously passed. Likewise, it is highly unlikely that the Authority has a right to bargain away rights of the legislature.

In 109 Cong. Rec. 5347-5359, several senators expressed the view that it was never intended that the labor provisions of a 13(C) Agreement would supercede state law in the labor relations area. Secretary of Labor Wirtz confirmed this view at hearings on the U.M.T.A. bill. Accordingly, the 13(C) Agreement should not be construed as a prohibition against the Massachusetts legislature from amending a law it passed in 1964.

Paragraph 4 of the 13(C) Agreement preserves and continues the right to arbitrate labor disputes to the extent such are provided by applicable law and/or existing collective bargaining agreements. Nowhere does it establish how the arbitrator is to be selected, what experience or expertise he shall have, whether there will be one or three arbitrators, or any guidelines that shall be applied in fashioning an award. The 13(C) Agreements only concern is that the right to arbitrate be preserved and continued.

Where the right to arbitrate is given in the first instance by the legislature, then that right can also be modified or amended by the legislature. The 13(C) Agreement merely tracks whatever arbitration process is then in existence. Where the 13(C) Agreement does not establish any specific arbitration procedure, no conflict exists with that instrument as long as the right to arbitrate is preserved.

The arbitrator is urged to adopt the issue suggested by the Authority and to find that the Authority has not violated the 13(C) Agreement, and dismiss the dipute.

DISCUSSION

The employees of the M.B.T.A. were not always public employees. In 1947 and before they were employees of a private corporation, many of whom had a history of collective bargaining and interest arbitration going back some thirty-five years. In the interest of fairness to the employees, Section 19 of Chapter 544 of the Acts of 1947 preserved the long standing collective bargaining and interest arbitration relationship by the following language:

> The trustees shall have authority to bargain collectively with labor organizations representing employees of the

> Authority and to enter into agreements with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of such employees. The employees of the Authority shall submit all grievances and disputes to arbitration pursuant to arbitration provisions in agreements existing at the time of the creation of the Authority or subsequently entered into with the Authority, or, in the absence of such provisions, to the state board of conciliation and arbitration, or other board or body having similar powers and duties.

When they first became public employees, their pre-existing contract provisions for arbitrating disputes were accorded a respected status, as well as a recognition that they could be changed by negotiations or arbitration in subsequent agreements with the Authority. Chapter 544 of the Acts of 1947 also provided that contract arbitration would continue to be the method used to resolve disputes in preference to any public arbitration board.

With the creation of the M.B.T.A. in 1964, the language of Section 19 of Chapter 544 of the Acts of 1947 respecting collective bargaining and the arbitration of disputes, was carried over to Section 19 of Chapter 161A without substantive change. The language was merely tailored to the new concept of managerial directors rather than trustees. The contract method of arbitrating disputes was preserved and protected by the specific language of Section 19.

Also in 1964 Section 29 of Chapter 161A was adopted and it reads:

> S 29. The Authority is authorized and directed from time to time to take all necessary action to secure any fed-

eral assistance which is or may become available to the commonwealth or any of its subdivision for any of the purposes of this chapter. If any federal law, administrative regulation or practice requires any action relating to such federal assistance to be taken by any department or instrumentality of the commonwealth other than the authority, such other department or instrumentality is authorized and directed to take all such action, including without limitation filing applications for assistance, supervising the expenditure of federal grants or loans and making any determinations and certifications necessary or appropriate to the foregoing, and the authority is authorized and directed to take all action necessary to permit such other department or instrumentality to comply with all federal requirements. It is the intent of this section that the provisions of any federal law, administrative regulation or practice governing federal assistance for the purposes of this chapter shall, to the extent necessary to enable the commonwealth or its subdivisions to receive such assistance and not constitutionally prohibited, override any inconsistent provisions of this chapter.

The arbitrator is persuaded that the Union correctly contended that one of the reasons, if not the principal reason, for the creation of the M.B.T.A. in 1964, was to take advantage of the new federal legislation, the Urban Mass Transportation Act, (49 U.S.C. 1600, *et seq.*) which was established to provide federal funds for mass transportation purposes to cities, towns and political subdivisions only.

The Union also correctly observed that where private transit systems would become public entities to take advantage of the available federal monies, Congress was concerned that employees could lose benefits obtained in collective bargaining in

the transition from private to public employment. This was why a critical aspect of the funding arrangements was the labor protective provisions, called the "13(C)" protective conditions from the section reference in the original act, which reads:

49 U.S.C. S 1609 (c)

> It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

Commencing in 1966 the M.B.T.A. and Local 589 entered into its first 13(C) Agreement. The last such agreement in effect at the time interest arbitration was invoked in 1978 was

dated December 10, 1974. The following excerpts from the December 10, 1974, 13(C) agreement are relevant to our inquiry:

> 2. All rights, privileges and benefits (including pension rights and benefits) of employees of the Authority represented by the Union and/or employees having already retired, under the existing collective bargaining agreement shall be preserved and continued for the life of this agreement unless changed, amended, or altered as provided in said collective bargaining agreement.
>
> 3. The collective bargaining rights of employees of the Authority represented by the Union, including the right to arbitrate any labor dispute, as provided in applicable laws and/or the existing collective bargaining agreement, shall be preserved and continued for the life of this agreement, and the Authority agrees that it will negotiate and bargain collectively with the Union on all matters of employee and employer relations, including wages, salaries, hours, working conditions, health and welfare benefits, pension and retirement allowances, in an effort to reach an agreement and failing to agree, the matters will be resolved by arbitration as provided in the existing collective bargaining agreement.
>
> 4. In the case of any labor dispute arising under or in connection with the terms and provisions of this agreement where collective bargaining does not result in a satisfactory settlement, the same may be submitted to arbitration in accordance with the arbitration provision set forth in the then existing collective bargaining agreement. The term "labor dispute", as used in this paragraph, shall be broadly construed and shall include any controversy concerning wages, salaries, hours, working conditions or benefits including health, and welfare, sick

leave, insurance or pension or retirement provisions, the making or maintaining of collective bargaining agreements, the terms to be included in such agreements, the interpretation or application of such agreements, the adjustment of grievances, and any claim, difference, or controversy arising out of, or by virtue of, the within arrangements for the protection of employees.

The arbitrator is unable to adopt the Authority's interpretation that the phrase — *as provided in applicable laws* found in Section 3 of the December 10, 1974, 13(C) Agreement, means as provided in the new amendments to Section 19 of Chapter 161A which took affect on July 13, 1978. While arguably such a meaning could reflect the intent of the parties, a critical examination of the purpose of 13(C) agreements, the text of the December 10, 1974, 13(C) Agreement, and the legislative history of the M.B.T.A. and the M.T.A., makes it most unlikely that this was their intent when they adopted the December 10, 1974, 13(C) Agreement.

Section 2 of the December 10, 1974 13(C) Agreement expressly limits changes in privileges and benefits, except as provided in the collective bargaining agreement.

Section 3 states that the collective bargaining rights of employees as provided in applicable laws and/or existing collective bargaining agreements, including the right to arbitrate any labor dispute, shall be preserved and continued for the life of this Agreement. This refers to those rights of employees in existence at the time of the adoption of the 13(C) Agreement. Moreover, the phrase — "as provided in applicable law", refers to situations where there are no collective bargaining agreements dealing with arbitration, and where such agreements exist the "and/or" appears to provide that the arbitration provisions of the agreement control when applicable law

provides for a different arbitration procedure. The same sentence concludes with the requirement that matters not settled by negotiations will be resolved by arbitration *as provided in the existing collective bargaining agreement.*

Section 4 reiterates that arbitration in accordance with the arbitration provision in the existing collective bargaining agreement will be utilized for unresolved labor disputes, and it then goes on to define "labor dispute" and provide that the term shall be broadly construed including among other things any controversy arising out of, or by virtue of, the within arrangements for the protection of employees.

The Authority's position that the July 13, 1978 amendments to Chapter 161A Section 19, represents the applicable law governing interest arbitration, because the legislature never relinquished its right to amend Chapter 161A section 19, constitutes an unacceptable premise. If it were true, the legislature could presumably eliminate collective bargaining and arbitration for employees and thereby negate the Authority's 13(C) commitments to preserve and continue all employee benefits. Obviously this would create a conflict between the 13(C) Agreement and state law requiring ultimate resolution by the courts. The same kind of conflict was created here when the legislature passed and the Governor signed the amendments to Section 19 of Chapter 161A, and the Authority maintained that it had to proceed to interest arbitration under the new amendments rather than under the arbitration provisions in the collective bargaining agreement.

It cannot be seriously disputed that one of the benefits protected and continued by the December 10, 1974, 13(C) agreement was the right to proceed to interest arbitration under the arbitration provisions in the collective bargaining agreement in the event of an impasse in negotiations.

Nor can it be seriously denied that that benefit is so circumscribed by the new amendments that it has not been preserved

and continued, if the amendments now constitute the interest arbitration procedure that must be observed by the parties.

The Union correctly noted several reasons why the arbitration provisions in the collective bargaining agreement would be eroded by the new amendments. First among these is the fact that arbitration is now regulated by statute rather than by contract. There is no question that the parties do not have the freedom to change statutory arbitration procedures that they do to change their own contract arbitration procedures. Unfair or unworkable statutory arbitration procedures cannot be corrected by the parties themselves in negotiations, or be submitted to a board of arbitration for correction. This is an inherent impairment of the collective bargaining arbitration procedures which were preserved and continued by the 13(C) Agreement.

Requiring interest arbitration before a single arbitrator rather than a tripartite board with a neutral and two partisan arbitrators, also represents an impairment in the collective bargaining arbitration provisions protected by the 13(C) agreement. The input of the partisan arbitrators to achieve an award that is reasonably acceptable, represents an irreplacable loss to the process and converts it into more of an adversary proceeding than the extention of the collective bargaining process that it was.

Requiring the single arbitrator to be a resident of the Commonwealth of Massachusetts and experienced in local and state finance, imposes a significant change on the interest arbitration procedure of the collective bargaining agreement preserved by the 13(C) Agreement. "Experienced in transportation" was the qualification established by the parties and under the new amendments this qualification is no longer required or considered. The Union may well be right that the new statutory qualifications are designed to prevent arbitrators qualified by training and experience to handle a complex

interest arbitration from serving as the single arbitrator, and to limit the selection to persons who may be more easily influenced by local political pressures and give disproportionate weight to management's arguments about the impact on the tax structure of increased labor costs for the M.B.T.A. Even if this were not the design of the new law, this change in the selection of the neutral arbitrator, with the emphasis on residency and experience in state and local finance, and no consideration to experience in transportation, makes in increasingly unlikely that the person selected can give the Union a fair shake, and this impacts adversely on the contract arbitration provisions protected by the 13(C) Agreement.

Section 19F of Chapter 161A requires the arbitrator to rely primarily on 9 specified factors in determining the basis of an award. As I read these factors, the arbitrator is prohibited from considering wages, benefits and conditions received by employees in comparable transit properties outside of Massachusetts. Such a comparison has been traditionally considered one of the priority elements in any interest arbitration in the transit industry, and its elimination can only be viewed as stacking the deck against the employees, and a devastating erosion of the contract arbitration procedure protected by the 13(C) Agreement.

Most all the listed factors in Section 19F are normally argued and considered in an interest arbitration, but now Section 19G requires the arbitrator to give a written analysis of *all* the statutory factors applicable to the procedures, without requiring the production of evidence relating to these factors by either party. Moreover, management's traditional arguments are now listed in the statute as mandatory criteria to be considered and addressed by the arbitrator, while the Union's traditional arguments are either unavailable or given no such comparable status.

The Union correctly argued that the overall effect of Section 19F and G of Chapter 161A, was to provide management with an advantage in any interest arbitration while disadvantaging the employees.

The collective bargaining agreement in effect when the December 10, 1974, 13(C) Agreement was negotiated contained a cost of living "roll-over" provision. It was awarded by the Harry H. Platt arbitration board in 1973 to protect employees against the ravages of inflation during the often lengthy periods between collective bargaining agreements when negotiations or arbitration was in progress. Section 19G of the new statute prohibits an arbitrator from awarding a "roll-over" cost of living provision, and this prohibition constitutes a clear conflict with the employee benefits protected by the 13(C) Agreement.

The Authority's argument that interest arbitration must conform to the legislative scheme set forth in Chapter 161A, Section 19, and that this does not conflict with the December 10, 1974 13(C) Agreement cannot be adopted. While another forum may find that interest arbitration must conform to the new amendments to Section 19 of Chapter 161A, there are numerous conflicts between these new amendments and the 13(C) Agreement as indicated previously. What those conflicts mean is not for this arbitrator to say, but the finding is required that the conflicts exist and are substantial and substantive.

Lengthy arguments were advanced by the Authority supportive of a "legislative scheme" that didn't conflict with the 13(C) Agreement which only guaranteed interest arbitration, not the form it should take. After the Authority urged the arbitrator to adopt these arguments, it thereupon argued that the arbitrator should not undertake an analysis of Chapter 405 of the Acts of 1978, for that is the responsibility of the courts. There is a logical inconsistency here that cannot be reconciled.

It would be far easier to avoid construing statutes to determine whether they conflict or not with collectively bargained agreement, but this task cannot be avoided when the dispute which the arbitrator is charged with deciding is focused on this very point. Moreover, the Authority's argument that the right to arbitrate is all that is protected by the 13(C) Agreements, and not the form arbitration is to take, is like saying that the right to wages is protected but not the amount.

The Authority also maintained that the instant dispute does not come within the purview of the 13(C) Agreement because the Union failed to show any connection between this controversy and the federal assistance to the project. The fact that the new amendments to Section 19 of Chapter 161A purport to establish arbitration procedures for *all* M.B.T.A. employees, necessarily means that *any* M.B.T.A. employees affected by federal assistance have had those rights and benefits ostensibly protected by the 13(C) Agreement, compromised by the newly enacted statutory arbitration.

The Authority also contends that the legislature never gave up its right to amend Chapter 161A, Section 19, but when it authorized the M.B.T.A. in Section 29 of Chapter 161A to take all necessary action to secure any federal assistance which is or may become available to the Commonwealth, it of necessity assumed some responsibility for the necessary actions taken by the M.B.T.A., including the execution of 13(C) Agreements. As stated earlier, it is not the arbitrator's responsibility to determine what deference will be accorded to the July 10, 1978 amendments to Chapter 161A, Section 19, but it is my finding that those amendments clearly conflict with the 13(C) commitments made by the Authority with Local 589.

AWARD

The July 10, 1978 amendments to Section 19 of Chapter 161A of the General Laws, and the M.B.T.A.'s insistence on arbitrating interest disputes pursuant to those amendments, constitutes a conflict with the pre-existing 13(C) Agreements executed by the parties.

William J. Fallon
Impartial Umpire

August 13, 1979.
Boston, Mass.

The Commonwealth of Massachusetts

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Michael Joseph Connolly
Chap. 581 Secretary of the Commonwealth

Chap. 581. AN ACT RELATIVE TO THE STRUCTURE OF THE MASSACHUSETTS BAY TRANSPORTATION AUTHORITY.

Be it enacted, etc., as follows:

SECTION 1. Section ninety-one A of chapter one hundred and sixty-one of the General Laws is hereby repealed.

SECTION 2. Section 3 of chapter 161A of the General Laws is hereby amended by striking out paragraph (d), as most recently amended by section 6 of chapter 1140 of the acts of 1973, and inserting in place thereof the following paragraph:-

(d) To appoint and employ officers, including a general manager, agents, and employees to serve at the pleasure of the directors, except as may otherwise be provided in collective bargaining agreements, and to fix their compensation and conditions of employment; provided, however, the authority may bind itself by contract to employ not more than five senior officers but no such contract shall be for a period of more than five years. The advisory board shall approve the appointment of a general manager.

The authority shall annually, on or before January first, submit a schedule of salaries of all its employees and any proposed increases therein to the secretary of administration for his review. Said secretary may make recommendations to the authority on said salary structure and shall advise the authority of the prevailing rates that the commonwealth pays for similar services.

SECTION 3. Said chapter 161A is hereby further amended by striking out section 6, as most recently amended by section 10 of said chapter 1140, and inserting in place thereof the following section:-

Section 6. The authority shall be managed by a board of seven directors, hereinafter in this chapter called the directors, one of whom shall be the secretary, who shall be the chairman and shall not be compensated therefor, six of whom shall be appointed by the governor and who shall serve coterminus with the governor, one with the approval of the advisory board, one with the approval of the fourteen cities and towns, and one with the approval of the sixty-four cities and towns. The approval of the fourteen cities and towns shall be determined by a majority vote of their mayors, or city managers in the cases of Plan D or Plan E cities, and chairmen of the boards of selectmen and town managers in towns having a town council form of government with the vote of each city and town counted as on said advisory board; provided that fifty per cent or more of the total votes as

set forth in said section seven is represented at such meeting. The approval of the advisory board and of the sixty-four cities and towns shall be determined by a majority vote of their mayors or city managers and chairmen of selectmen or town managers present and voting thereon with the vote of each city and town counted as on said advisory board; provided that fifty per cent or more of the total votes as set forth in said section seven is represented at such meeeting. One of the appointees of the governor shall be experienced in transportation, one a member of organized labor who shall be a member of a national or international labor organization, and one experienced in administration and finance. No more than four of the seven directors shall be members of the same political party. Two of the appointees of the governor shall not be residents of the area constituting the authority.

Any director except the chairman may be removed for cause by the governor and any vacancy in the office of a director shall be filled, by appointment of the governor with the approval applicable to such under the provisions of section three of chapter twelve shall not apply to said board of directors. The six directors appointed by the governor shall receive a salary of seven thousand five hundred dollars. A majority of the directors shall constitute a quorum, but a majority vote of the entire membership of the board of directors shall be required to take any particular action.

SECTION 4. Said chapter 161A is hereby further amended by inserting after section 7 the following section:-

Section 7A. A designee of the governor shall be a member of the advisory board, and shall have the same number of votes on said board as the city or town with the greatest number of votes on said board; provided, however, that the designee shall not be considered a voting member on the approval of any appointment to the board of directors, or the position of general manager; provided, further, that in any case where the designee of the governor, and said city or town with the greatest number of votes shall vote the same, their combined vote shall equal the vote of said city or town; and provided, further, that an affirmative vote of at least one-third of the cities and towns present and voting shall be required for approval of any action or appointment.

The number of votes of such designee shall be in addition to the total number of votes of each city and town as determined by the authority, based upon the most recent annual assessment.

SECTION 5. Said chapter 161A is hereby further amended by inserting after section 11 the following section:-

Section 11A. Any of the sixty-four cities and towns may for the purpose of providing local bus service enter into agreements with any person lawfully authorized to operate any motor bus on any public way therein for the carrying of passengers for hire.

Said city or town shall have the same powers and duties in respect to such private bus carriers as are provided by law for the department of public utilities, except as to safety of equip-

ment and operations, schedules, and routes not being, however, considered safety of equipment and operations for purposes of this paragraph; and provided that the authority shall be notified of the establishment of any such contract local service, but shall not have control or jurisdiction over said service.

SECTION 6. The third paragraph of section 12 of said chapter 161A, as appearing in section 18 of chapter 563 of the acts of 1964, is hereby amended by adding the following sentence:- The authority shall consult with the finance advisory board established by section ninety-seven of chapter six prior to the sale of any such notes as to the timing and terms thereof.

SECTION 7. Subsection (a) of section 12A of said chapter 161A, as appearing in section 15 of chapter 4 of the acts of 1976, is hereby amended by adding the following sentence:- The authority shall consult with the finance advisory board established by section ninety-seven of chapter six prior to the sale of any such notes as to the timing and terms thereof.

SECTION 8. Section 19 of said chapter 161A is hereby amended by striking out the first sentence, as appearing in section 18 of chapter 563 of the acts of 1964, and inserting in place thereof the following sentences:- The directors shall have authority to bargain collectively with labor organizations representing employees of the authority and to enter into agreements, with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of such employees; provided, however, that the directors shall have no authority to bargain collectively and shall have no authority to enter into collective bargaining agreements with respect to matters of inherent management right which shall include the right:

(i) to direct, appoint, employ, assign and promote officers, agents and employees and to determine the standards therefor.

(ii) (A) to discharge and terminate employees subject to the provisions of such clauses (B) and (C).

(B) No action set forth in (A) shall be sustained if, in a proceeding invoked in accordance with the provisions of such clause (C), the employee shall establish by a preponderance of the evidence that it was based upon race, color, religion, sex, age, national origin, handicapping condition, marital status, or political affiliation or activities or union activities or union organizing of the employees; a reprisal against the employee for disclosure of information by an employee which the employee reasonably believes evidences a violation of any law, rule or regulation or mismanagement, a gross waste of funds, or abuse

of authority; a reprisal against any employee for the refusal of any person to engage in political activity.

(C) The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration which may be invoked in the event any employee of the authority is aggrieved by any action taken under such clause (A).

(iii) to plan and determine the levels of service provided by the authority.

(iv) to direct, supervise, control, and evaluate the departments, units, and programs of the authority; to classify the various positions of the authority and ascribe duties and standards of productivity therefor.

(v) to develop and determine levels of staffing and training.

(vi) to determine whether goods or services should be made, leased, contracted for, or purchased on either a temporary or permanent basis.

(vii) to assign and apportion overtime.

(viii) to hire part-time employees.

The authority is hereby prohibited from bargaining collectively or entering into any agreement to make pension benefit payments to its employees that are determined in a manner that includes the amount of overtime earnings of said employees.

The authority is hereby prohibited from bargaining collectively or entering into a contract which provides for automatic cost-of-living salary adjustments which are based on changes in the Consumer Price Index or other similar adjustments unless specifically authorized by law.

SECTION 9. Section 19F of said chapter 161A, as appearing in section 2 of chapter 405 of the acts of 1978, is hereby amended by striking out paragraph 8 and inserting in place thereof the following paragraph:-

8. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between parties, in the public service of the commonwealth, and which are not precluded from bargaining under section nineteen.

SECTION 10. The second paragraph of section 23 of said chapter 161A, as appearing in section 18 of chapter 563 of the acts of 1964, is hereby amended by adding the following sentence:- No bonds of the authority shall be sold by the authority unless prior to such sale the authority shall have consulted with the finance advisory board established by section ninety-seven of chapter six as to the timing and terms thereof.

SECTION 11. The fourth paragraph of said section 23 of said chapter 161A, as amended by section 3 of chapter 650 of the acts of 1965, is hereby further amended by striking out the last sentence and inserting in place thereof the following sentence:- Subject to the requirement of consultation with the finance advisory board established by section ninety-seven of chapter six, the authority may sell such bonds in such manner, either at

The Commonwealth of Massachusetts

Advance Copy 1980 Acts and Resolves
Michael Joseph Connolly
Chap. 581 Secretary of the Commonwealth

public or private sale, and for such price as it may determine to be for the best interests of the authority.

SECTION 12. Said chapter 161A is hereby further amended by striking out section 29, as appearing in section 18 of chapter 563 of the acts of 1964, and inserting in place thereof the following section:-

Section 29. The authority is authorized and directed from time to time to take all necessary action to secure any federal assistance which is or may become available to the commonwealth or any of its political subdivisions, for any of the purposes of this chapter. If any federal law, administrative regulations or practice requires any action relating to such federal assistance to be taken by any department or instrumentality of the commonwealth other than the authority, such other department or instrumentality is authorized and directed to take all such action, including without limitation filing applications for assistance, supervising the expenditure of federal grants or loans to the foregoing, and the authority is hereby authorized and directed to take all actions which are not inconsistent with state law and which are necessary to permit such other department or instrumentality to comply with federal requirements. If the provisions of any federal law, administrative regulation, or practice governing federal assistance for the purposes of this chapter are inconsistent with any provisions of this chapter to the extent that the commonwealth or its political subdivisions are prohibited or potentially prohibited from receiving such assistance, the chairman of the authority shall, within thirty days after the federal government has notified him that an inconsistency may exist, notify the governor, and the clerks of the house and senate of such inconsistency.

SECTION 13. Chapter 151 of the acts of 1979 is hereby amended by striking out section 8A and inserting in place thereof the following two sections:-

Section 8A. The budget of the Massachusetts Bay Transportation Authority shall not be greater than one hundred and four per cent of the budget approved for said authority for the preceding fiscal year, provided, however, that said budget may be increased by those amounts approved in accordance with section eight B.

Section 8B. The Massachusetts Bay Transportation Authority may increase the budget limit imposed by section eight A by the approval of a specified amount by a two-thirds vote of the members of the advisory board present and voting.

SECTION 14. Section 16 of said chapter 151 is amended by adding the following at the end thereof:-

; provided, however, that sections eight A and eight B shall not expire until December thirty-first, nineteen hundred and eighty-three, and the provisions of section two, and sections 15A through 15E inclusive, insofar as applicable to the provisions of section eight A, shall not expire until December thirty-first, nineteen hundred and eighty-three.

SECTION 15. The directors of the authority, and each of the bargaining units within the authority, are hereby directed to establish for each said bargaining unit a productivity and conduct committee to be composed of three members of management chosen by the directors and three members of the respective bargaining unit, to be chosen by the officers thereof.

Said committees shall recommend the establishment of standards of productivity, and conduct of employees for each respective bargaining unit no later than June thirtieth, nineteen hundred and eighty-one.

The directors shall review, revise and implement said standards no later than thirty days after receiving such recommendations, and shall file a report with the clerk of the house of representatives on each set of standards as they are implemented.

SECTION 16. The authority is hereby authorized and directed to develop, implement and utilize an equipment maintenance information recording system for the authority. The authority shall establish a joint labor-management committee for the purpose of providing consultation and cooperation in the development of said equipment maintenance information recording system. Said systems reporting requirements shall include, but not be limited to, vehicle numbers, defects reported, defects found, cause determination, action taken, by whom, and duration of repair. Said system is to be developed, approved by the authority's board of directors, implemented in the automotive equipment maintenance department, and a report outlining said system filed in the office of the house clerk no later than the first Wednesday of January, nineteen hundred and eighty-two.

The clerk shall forward said report to the joint committees on transportation and post audit and oversight, and the report shall be reviewed by a subcommittee of the post audit and oversight committee, which shall be appointed by the chairman thereof.

Said subcommittee, in consultation with the transportation committee may make such recommendations as they deem necessary to the authority with regard to said information system.

Said systems will be initially implemented in the automotive department and upon acceptance by the authority initiated in all other equipment maintenance departments as it applies to said departments.

SECTION 17. Commencing with the commonwealth's fiscal year nineteen hundred and eighty-four, beginning on July first, nineteen hundred and eighty-three, the Massachusetts Bay Transportation Authority shall operate on a fiscal year cycle coinciding with that of the commonwealth.

The board of directors of said authority shall prepare a plan to implement said fiscal year change and shall submit for approval said plan to the secretary of administration and finance not later than the first Wednesday of December, nineteen hundred and eighty-one.

Notwithstanding any general or special law to the contrary, commencing with the commonwealth's fiscal year nineteen hundred and eighty-four, all expenses of the authority shall be in accordance with an itemized budget. The authority, in consultation with the secretary of transportation and the advisory board, shall prepare and shall submit such budget for the ensuing fiscal year to the secretary and the advisory board not later than the date set by the commissioner of administration pursuant to section three of chapter twenty-nine of the General Laws for the submission of statements to the budget director.

The secretary shall review and make recommendations regarding such budget within thirty days after submission.

Within forty-five days after submission, the advisory board shall approve said budget as submitted or subject it to such itemized reductions therein as the advisory board shall deem appropriate. Such itemized reductions shall be accompanied by a clear delineation of the areas of services to be reduced and the degree of reduction of service including a statement by location, line, and mode of the level of maintainable service resulting from such itemized reduction. The advisory board shall vote on each item within the authority's budget and may subject the authority's proposed budget to itemized reductions as the advisory board may deem appropriate. The board of directors shall, no later than the first Wednesday in December file a copy of such budget with the governor. Said budget shall include all requests and recommendations of the authority for capital outlay programs and projects for the ensuing year.

Within three weeks after the convening of the general court the governor shall file a copy of the budget with the clerk of the house of representatives and the clerk of the senate. Said budget shall include all requests and recommendations of the authority for capital outlay programs and projects for the ensuing year.

The governor shall include as a line item within the budget submitted pursuant to Section 2 of Article LXIII of the Amendments to the Constitution his recommendation for the share of the net cost of service at the Massachusetts Bay Transportation Authority to be paid by the commonwealth.

SECTION 18. Notwithstanding the provisions of subsection (1) of section five of chapter one hundred and sixty-one A of the General Laws, chapter one hundred and fifty-one of the acts of nineteen hundred and seventy-nine, section twenty-seven C of

chapter twenty-nine of the General Laws and of section twenty A of chapter fifty-nine of the General Laws, the board of directors of the Massachusetts Bay Transportation Authority may by an affirmative vote of the directors, approve and restore to the budget for the calendar year nineteen hundred and eighty any or all itemized reductions which the advisory board may make or may have made in any budget or supplementary budget submitted to it; provided, however, that the amounts so approved and so restored to any such budgets shall not cause it to exceed the total sum of three hundred and forty-three million one hundred and sixty-six thousand eight hundred and forty-six dollars; and provided, further, that no amount in excess of three hundred and forty-three million dollars shall be spent unless the authority conducts its labor negotiations in accordance with chapter four hundred and five of the acts of nineteen hundred and seventy-eight. Said budget shall cover all expenditures incurred by the Massachusetts Bay Transportation Authority board of directors during calendar year nineteen hundred and eighty, including without limitation those costs incurred pursuant to Executive Order No. 189, issued on November eighteenth, nineteen hundred and eighty. The Local Aid Fund shall not be reduced by the amount of any funds restored pursuant to this section.

SECTION 19. In addition to the contract assistance authorized to be provided in section twenty-eight of chapter one hundred and sixty-one A of the General Laws, the commonwealth, acting by and through the executive office of administration and finance, may enter into an additional contract with the Massachusetts Bay Transportation Authority for contract assistance of a portion of the net cost of the calendar 1980 budget approved by the Advisory Board. In addition, for said year, the commonwealth shall provide assistance equal to the seventy-five per cent of the net cost of service in excess of three hundred and two million, one hundred and thirty thousand, three hundred and seventy-seven dollars authorized by the advisory board for operation of the authority for such year.

SECTION 20. One-third of said additional net cost of service assumed by the commonwealth pursuant to section fourteen C shall be included in any determination of total costs, charges, or fees, under the provisions of section twenty A of chapter fifty-nine of the General Laws, for the cities and towns within the jurisdiction of the authority.

SECTION 21. Section twenty A of chapter fifty-nine of the General Laws, as inserted by section twelve of chapter five hundred and eighty of the acts of nineteen hundred and eighty, shall apply to costs assessed upon member cities and towns of the Massachusetts Bay Transportation Authority, for the operation thereof, beginning calendar year nineteen hundred and eighty-one.

SECTION 22. The board of directors serving on the effective date of this act shall continue to serve until their successors are duly appointed.

The Commonwealth of Massachusetts

Advance Copy 1980 Acts and Resolves
Michael Joseph Connolly
Chap. 581 Secretary of the Commonwealth

SECTION 23. All positions vacant or which become vacant, on or after the effective date of this act, shall remain vacant; provided, that vacancies for which there exists a critical need may be filled upon certification of said critical need by the secretary of administration and finance; and provided, further, that said secretary shall report quarterly to the house and senate committees on ways and means the number, salary, title and job descriptions of all persons hired under the provisions of this section. No employee shall be terminated as part of any reduction in force, which result from enactment of this act, except in accordance with the provisions of the collective bargaining agreement in effect on the date of such termination.

SECTION 24. Section four of this act shall become inoperative on July first, nineteen hundred and eighty-three.

SECTION 25. The provisions of this act are severable, and if any of its provisions or an application thereof shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions or other applications thereof.

Approved December 7, 1980.

EMERGENCY LETTER - December 8, 1980 @ 12:46 P. M.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY ADVISORY BOARD & others vs. MASSACHUSETTS BAY TRANSPORTATION AUTHORITY & others.

Suffolk. November 22, 1980. — February 12, 1981.

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, KAPLAN, WILKINS, & LIACOS, JJ.

Massachusetts Bay Transportation Authority, Budget, Advisory board, Federal assistance. *Governor*. *Statute*, Construction. *Constitutional Law*, Expenditure of money, Separation of powers of government. *Practice, Civil*, Deferral of judicial remedy.

A judge of the Superior Court had no authority under G. L. c. 231A, § 3, to make a "preliminary declaration" of rights as to the validity of an executive order issued by the Governor [ ]; however, where the validity of the order was fully argued on the merits before this court and did not depend on any disputed matters of fact, this court treated the plaintiffs' request for a prompt declaration of rights as a motion for partial summary judgment in order to avoid rendering a decision that was merely tentative. [ ]

The provisions of G. L. c. 161A, § 29, authorizing and directing the Massachusetts Bay Transportation Authority "to take all necessary action to secure any federal assistance" do not override c. 161A, § 5 (*f*), which prohibits the authority from making expenditures in excess of its budget. [ ]

The Governor was not authorized by G. L. c. 161A, § 20, by St. 1950, c. 639, as amended, or by executive powers inherent in his office to suspend by executive order the operation of G. L. c. 161A, § 5(*f*), or to take possession of the lines and facilities of the Massachusetts Bay Transportation Authority because of an anticipated interruption of public transportation resulting from a budget dispute [ ]; in the circumstances, however, this court permitted the Governor to continue to operate the authority under executive order for the brief period necessary to convene the Legislature and to give the Legislature an opportunity to consider what action it deemed appropriate. [ ]

CIVIL ACTION commenced in the Superior Court Department on October 31, 1980.

After hearing before *Young*, J., the case was transferred to the Supreme Judicial Court for the county of Suffolk by *Abrams*, J., and was reserved and reported by her.

Stephen S. Ostrach, Assistant Attorney General (*Donald K. Stern & William L. Pardee*, Assistant Attorneys General, with him) for the Governor & another.

Joseph H. Elcock (*Ronald G. Busconi* with him) for the Massachusetts Bay Transportation Authority & others.

Herbert P. Gleason (*Thomas H. Martin & John F. Maher* with him) for the Massachusetts Bay Transportation Authority Advisory Board.

BRAUCHER, J. On November 18, 1980, the Governor of the Commonwealth issued Executive Order 189, proclaiming the existence of an emergency, taking possession of the lines and facilities of the Massachusetts Bay Transportation Authority (MBTA), and authorizing the Board of Directors of the MBTA to operate those lines and facilities. The present case was argued before the full court on November 22, 1980, and on November 28, 1980, we ordered the entry of a partial summary judgment declaring that "(1) Executive Order 189, except as stated below, is beyond the powers granted to the Governor and is of no force or effect. (2) Pursuant to Executive Order 189, the MBTA may continue to operate until 12:00 P.M. on Friday, December 5, 1980." Two Justices saw no justification for authorizing the continued operation of the MBTA beyond 12:00 P.M. on Tuesday, December 2, 1980, since "the Legislature, on its convening, promptly may pass legislation authorizing the continued operation of the MBTA, while the Legislature deliberates on other matters concerning the MBTA." We said that an opinion or opinions would follow, and we now issue our opinion.

1. *The proceedings.* On October 31, 1980, the MBTA Advisory Board filed in the Superior Court a complaint against the MBTA, its Board of Directors and Treasurer-Controller, and Barry M. Locke, and the Treasurer and Receiver General of the Commonwealth, seeking declaratory and injunctive relief. On November 10, 1980, a judge of

that court issued a preliminary injunction against the defendants other than the Treasurer and Receiver General. Those defendants were enjoined from (1) certifying or charging to the Treasurer and Receiver General any sums attributable to the MBTA net cost of service which derived from expenditures in excess of $302,130,152, and (2) expending or authorizing expenditures attributable to MBTA operations during the calendar year 1980 in excess of $302,130,152. Part (2) of the injunction was stayed until 12:00 P.M., Sunday, November 30, 1980. The order was affirmed by a single justice of the Appeals Court and by a single justice of this court.

The amount of the budget for calendar year 1980, approved by the Advisory Board pursuant to G. L. c. 161A, § 5 (*i*), was $302,130,562,[1] and it was estimated that at its current rate of expenditure the MBTA would exceed that amount on Wednesday, November 12, 1980. On November 16, the Advisory Board met and voted not to approve any supplementary budget; on November 17 the General Court met in special session to consider MBTA questions, but took no action. On Tuesday, November 18, the Governor issued Executive Order 189, which limited MBTA expenditures to "$41,000,000 over the currently approved budget." On November 19 the Advisory Board filed an amended complaint, adding twenty-seven individual taxpayers as plaintiffs and adding the Governor as a defendant.

On Friday, November 21, 1980, after hearing, the judge dictated a "memorandum of decision." He declared that the injunction previously issued would remain in effect but would not apply to the defendants acting as "agents of the Commonwealth under the authority of the Governor." He denied further injunctive relief, but made "a preliminary declaration of the rights of the parties," that "it is reasonably likely that, upon the trial of this matter, it will be declared that: 1. Executive Order 189 is unlawful as being beyond the powers granted to the Governor and is, there-

[1]The discrepancy of $410 is not explained.

fore, of no force and effect. 2. Neither agents of the Commonwealth nor of the MBTA have any present power to incur obligations on behalf of the MBTA beyond its authorized budget or on behalf of the Commonwealth for the account of the MBTA beyond its authorized budget. 3. Any such obligations incurred in excess of monies appropriated therefor appear to impose the risk that . . . there may well be no liability on the Commonwealth pursuant to General Laws, Chapter 29, Section 26."

At the suggestion of the judge, a single justice of this court issues an order the same day transferring the case to the county court pursuant to G. L. c. 211, § 4A, for preparation of the record on the MBTA's appeal to the full court from the order of November 21, 1980. By a separate order the single justice reserved and reported that order without decision for argument before the full court on Saturday, November 22, 1980. On that day, after argument, a majority of the full court ordered that the "preliminary declaration" entered in the Superior Court on November 21 be vacated.

On November 28, 1980, the full court issued its order for partial summary judgment, to be entered in the Supreme Judicial Court for Suffolk County.[8]

2. *The facts.* On the basis of the verified complaints, supporting affidavits, and representations of counsel, the judge found that there was a reasonable likelihood that the Advisory Board could establish the following facts at trial, and those facts were not disputed in argument before us. The Advisory Board originally approved an MBTA budget of $302,130,562 for the calendar year 1980. After negotiations over a period of several weeks, the MBTA on August 19, 1980, requested a supplemental budget of $41,000,000. The executive committee of the Advisory Board voted on September 3, 1980, not to increase the

[8]Subsequent to our order, the Legislature met in special session. The MBTA ceased to operate after Friday, December 5, 1980, but on December 7, 1980, the Legislature authorized the MBTA Board of Directors to restore budget reductions but not to exceed the total sum of $343,166,846. St. 1980, c. 581, § 18. Operations were promptly resumed.

budget, and the executive director of the Advisory Board sent a letter to the Governor and the MBTA on September 5, 1980, giving notice of that action. On September 15, 1980, the Advisory Board met and confirmed the action of its executive committee. The judge ruled that the September 5 letter satisfied the notice requirement of G. L. c. 161A, § 7, and that ruling was not contested before us.

Early in November, the MBTA had overspent some line items in the approved budget, and it would exceed the aggregate amount authorized on November 12. The annual deficit of the MBTA, defined as the "net cost of service" in G. L. c. 161A, § 1, is certified to the Treasurer and Receiver General. G. L. c. 161A, § 12. He subtracts State and Federal assistance payments and assesses the balance on the seventy-nine cities and towns in the MBTA district in accordance with formulas set out in G. L. c. 161A, §§ 8-11. Realistically, the judge said, there would be no hope that the cities and towns could recover funds illegally spent by the MBTA and assessed on them. Thus the Advisory Board and its constituent cities and towns would be irreparably injured if the MBTA spent funds beyond those authorized.

On November 18, 1980, there was an imminent risk of a slowdown, interruption or stoppage of service of the MBTA. Such an event, as the Executive Order recited, would cause the highways of the Commonwealth in the areas of metropolitan Boston to become so clogged with traffic during a substantial part of the day that the passage of fire fighting equipment, police, ambulances, vehicles used for the transportation of food and other essential vehicles would be impeded, thus endangering the health, safety and property of the citizens of the Commonwealth by increasing the likelihood of damage to property and loss of life because of fire and by creating serious shortages of foods. These events threatened the availability of essential services of transportation to such an extent as to endanger the health, safety and welfare of the community.

3. *Jurisdiction.* In the Superior Court the plaintiffs argued that the validity of Executive Order 189 was subject to

judicial review. The Governor and the Treasurer and Receiver General (the State defendants) resisted both injunctive and declaratory relief on a variety of grounds, including an argument that the Governor is not a proper party to this action, citing *Rice* v. *The Governor*, 207 Mass. 577, 579 (1911), and G. L. c. 231A, § 2, as amended by St. 1974, c. 630, § 1. No injunctive relief was granted with respect to the Executive Order, but after the case was transferred to this court the State defendants moved to vacate the "preliminary declaration" entered in the Superior Court, "since the practical effect of that declaration is that the Massachusetts Bay Transportation Authority may cease operations as early as Monday, November 24, 1980." Immediately after argument, a majority of this court ordered that the "preliminary declaration" be vacated, emphasizing that no view was expressed as to the correctness of the rulings of the Superior Court. We now add that we find no authority for such a "preliminary declaration." Under G. L. c. 231A, § 3, as amended by St. 1974, c. 630, § 2, it is a sufficient reason for denying declaratory relief that the declaration "if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceedings."

After argument the plaintiffs submitted a memorandum asserting that relief was being "sought, anomalously, by the parties who prevailed in the Superior Court," and that there was confusion "as to what, exactly, was before the Court." The memorandum stated that the plaintifs would treat any matter comprehended by the order of November 21, 1980, as susceptible to consideration by this court. The State defendants took the same view, and the validity of Executive Order 189 was fully argued on the merits. We considered the case on that basis, and did not address any jurisdictional issue.

We noted that the questions of the validity and effect of Executive Order 189 did not depend on any disputed matters of fact, and that identical questions with respect to the validity and effect of Executive Order 172, issued December 18, 1979, had been fully briefed and argued by some of

the same parties and by the same leading counsel in November, 1980. To avoid rendering a decision that was merely tentative, we treated the request of the plaintiffs for a prompt declaration of rights as a motion for partial summary judgment, and allowed the motion. Mass. R. Civ. P. 56 (a), 365 Mass. 824 (1974).

4. *Federal requirements.* The MBTA statute, G. L. c. 161A, provided in § 5 (*i*), as amended by St. 1975, c. 205: "All current expenses of the authority shall be in accordance with an itemized budget. . . . The budget shall govern the current expenses of the authority during such calendar year. No such expenses may be incurred in excess of those shown in the budget, . . ." See *Boston* v. *Massachusetts Bay Transp. Auth.*, 373 Mass. 819, 823-824 (1977); *Massachusetts Bay Transp. Auth.* v. *Boston Safe Deposit & Trust Co.*, 348 Mass. 538, 543-546 (1965). The MBTA argued that those provisions were overridden by § 29, added by St. 1964, c. 563, § 18, which "authorized and directed" the MBTA and other State agencies "to take all necessary action to secure any federal assistance which is or may become available to the commonwealth or any of its subdivisions for any of the purposes of this chapter. . . . It is the intent of this section that the provisions of any federal law, administrative regulation or practice governing federal assistance for the purposes of this chapter shall, to the extent necessary to enable the commonwealth or its subdivisions to receive such assistance and not constitutionally prohibited, override any inconsistent provisions of this chapter."

The judge, in issuing a preliminary injunction on November 10, 1980, rejected that argument, and that action was not reported to this court. In his "memorandum of decision" of November 21, 1980, he did not discuss the issue, and it did not affect the "preliminary declaration" he then made. The MBTA argued to us, nevertheless, that the issue was before us, since the November 21 memorandum continued in effect the November 10 injunction. The State defendants did not address the issue, and it did not affect our decision. But we have no doubt that the judge correctly rejected the MBTA argument, and we now state our reasons.

As the judge recognized, the MBTA is the recipient of significant Federal assistance pursuant to the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601 et seq. (1976). Under the provisions of the Federal grants, the Commonwealth was required to maintain a level of effort and expenditure not less than the average of the funds expended on mass transit during the previous two fiscal years. 49 U.S.C. § 1604 (f). The MBTA budget complied. But the MBTA also gave assurances that it would "provide for the continued or improved operation of the system," and the operating grant contracts provided for reductions in Federal assistance in the event State and local funding or service levels were reduced.

Thus a reduction or cessation of service would jeopardize Federal funding for the MBTA. Nevertheless, we agree with the judge that G. L. c. 161A, § 29, did not authorize expenditures in excess of budget and thus contrary to G. L. c. 161A, § 5 (*i*). A contrary conclusion would render the budget review responsibility of the Advisory Board a nullity and would trespass on the exclusive legislative power to appropriate money. The effect of the budget on prospects of Federal assistance was a matter to be considered by the Advisory Board, but the Federal statute, regulations and contracts could not authorize expenditure of State funds contrary to § 5 (*i*). See *Opinion of the Justices*, 302 Mass. 605, 614 (1939); *Opinion of the Justices*, 294 Mass. 616, 621 (1936).

5. *Seizure under the MBTA statute.* The State defendants argued that the Governor's action was authorized by G. L. c. 161A, § 20.[3] The plaintiffs responded that that

[3] As inserted by St. 1964, c. 563, § 18: "Notwithstanding any contrary provision of law, whenever there exists a continued interruption, stoppage or slowdown of transportation of passengers on any vehicle or line of the authority or a strike causing the same, and which is in violation of an injunction, a temporary injunction, a restraining order, or other order of a court of competent jurisdiction, and which threatens the availability of essential services of transportation to such an extent as to endanger the health, safety or welfare of the community, the governor may declare that

section is limited to cases of labor disputes. The judge rejected the plaintiffs' argument, in accordance with the plain meaning of the statutory language, which covers "a continued interruption . . . *or* a strike causing the same" (emphasis supplied). He ruled that the language of the statute "encompasses the possibility of riot, severe vandalism, and the like." But, he ruled, the comma preceding the first "and which" clause made it clear that both "and which" clauses were applicable both to a "strike" and to any other "continued interruption." Hence, he ruled, the section applies only if the interruption, stoppage and slowdown is in violation of a court order. Since there was no such court order, the statute did not apply.

We agree with the judge's conclusion, though not with the stress he placed on the comma. A strictly grammatical reading, comma or no comma, would treat the two "and which" clauses as parallel to the preceding phrase, "causing the same." All three parallel modifiers would then modify only "strike," not "interruption, stoppage or slowdown." So read, however, the sentence seems peculiar, since the second "and which" clause, defining the threat that creates the emergency, ties into the following sentence and seems properly applicable to any covered case. Any ambiguity is resolved by the legislative history. As proposed by the Governor, the section bore the caption "Interruption, Stoppage or Slowdown of Transportation Service in Violation of Injunction: Emergency Powers of Governor." 1964 Senate Doc. No. 830. 1964 House Doc. No. 3646. All section captions were deleted from the statute as enacted, but the text

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an emergency exists. During such emergency he may take possession of, and operate in whole or in part, the lines and facilities of the authority in order to safeguard the public health, safety and welfare. Such power and authority may be exercised through any department or agency of the commonwealth or through any person or persons and with the assistance of such public or private instrumentalities as may be designated by him. Such lines and facilities shall be operated for the account of the authority. The powers hereby granted to the governor shall expire forty-five days after his proclamation that a state of emergency exists."

of § 20 was not changed. Thus we conclude, as did the judge, that the section has no application unless there is a violation of a court order.

6. *The civil defense statute.* Executive Order 189 also invoked St. 1950, c. 639, as amended (the civil defense statute). The recitals in the Executive Order follow the language of a clause added by St. 1958, c. 425, § 1: "whenever because of absence of rainfall or other cause a condition exists in all or any part of the commonwealth whereby it may reasonably be anticipated that the health, safety or property of the citizens thereof will be endangered because of fire or shortage of water or food"; the Governor may proclaim an emergency. The 1958 amendment bore the title "An Act authorizing the governor to deal with the threat of danger by drought." We do not think the Legislature intended to cover such an "other cause" as a budget dispute leading to an interruption of public transportation.

7. *The Governor's inherent powers.* Finally, Executive Order 189 invoked "any other powers vested in me [the Governor] under the Constitution of the Commonwealth, or otherwise." The Governor is the "supreme executive magistrate" of the Commonwealth. Part II, c. 2, § 1, art. 1, of the Constitution of the Commonwealth. See *Opinion of the Justices*, 375 Mass. 827, 833 (1978). We have recognized the existence of executive powers inherent in the office of Governor. See *Opinion of the Justices*, 368 Mass. 866, 875 (1975). The State defendants contended that Executive Order 189 was a proper exercise of such a power.

That contention fails. "The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for." Art. 20 of the Declaration of Rights of the Massachusetts Constitution. The Governor could not by executive order, in the absence of legislative authority, suspend the operation of G. L. c. 161A, § 5 (f). Nor could we. See *Commissioner of Pub. Health* v. *Bessie M. Burke Memorial Hosp.*, 366 Mass. 734, 741 (1975).

On the other hand, we recognize, as did the Superior Court judge, that the Governor was confronted by the prospect of a public disaster. The continued operation of the MBTA involved the expenditure of funds in violation of § 5 (*i*), and thus intruded upon the power of the Legislature to control expenditures. Unless expenditures were authorized by the Advisory Board, authority could be granted only by the Legislature with the approval of the Governor. But as a practical matter, notwithstanding violation of § 5 (*i*), funds would continue to be expended in order to shut down the operation of the MBTA in a manner consistent with the preservation of its immensely valuable rolling stock and other property. Resolution of the underlying political problems had no doubt been delayed by the legal uncertainties and the time needed, even with expedited proceedings, to obtain an authoritative decision. The Legislature was no longer in session, and it would need time to consider the alternatives.

In such circumstances deferral of coercive judicial remedies to permit action by the appropriate branch of government is a familiar expedient. See, e.g., *Hallenborg* v. *Town Clerk of Billerica*, 360 Mass. 513, 519-520 (1971). In *Reynolds*, v. *Sims*, 377 U.S. 533, 585-587 (1964), the Supreme Court of the United States approved the action of a lower court in ordering into effect an invalid plan for legislative apportionment as a temporary and provisional measure, in order to give the responsible State legislature an opportunity to remedy constitutional deficiencies. Accordingly, we expressed the view that "the Governor must have power to continue the operation [of the MBTA] for the period necessary to convene the Legislature and for consideration of such action as it deems necessary to authorize expenditures either to shut down or to continue the operation, and otherwise to regulate the operation of the MBTA."

We were in agreement that the Governor's power to continue MBTA operations would cease when the necessity ceased, and two Justices thought it would cease at 12:00 P.M. on Tuesday, December 2, 1980. In the opinion of a

majority of the court, however, the Legislature would need until 12:00 P.M. on Friday, December 5, 1980, for its deliberations, and our judgment permitted operation until the later time.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY ADVISORY BOARD & others *vs.* THE GOVERNOR & others.

Suffolk. November 5, 1980. — February 23, 1981.

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, KAPLAN, & WILKINS, JJ.

Massachusetts Bay Transportation Authority, Budget, Advisory board. *Governor*.

Although the expenditure of funds by the Massachusetts Bay Transportation Authority under an executive order of the Governor in December, 1979, violated the provisions of G. L. c. 161A, § 5(*l*), the cities and towns in the authority's district were not entitled to relief against assessments to the extent of the nearly $12 million expended under the executive order where the Legislature in subsequently appropriating over $83 million in additional State assistance to the authority intended the appropriation to cover the costs incurred under the order and where the assessable net cost of service to the cities and towns was less than their obligation under G. L. c. 161A as a result of the additional appropriation. [ ]

CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on July 9, 1980.

The case was reserved and reported by *Kaplan*, J.

Thomas H. Martin (*Herbert P. Gleason* with him) for Massachusetts Bay Transportation Authority Advisory Board.

Stephen S. Ostrach, Assistant Attorney General (*William L. Pardee*, Assistant Attorney General, with him) for the Governor & others.

Joseph H. Elcock (*Ronald G. Busconi* with him) for Massachusetts Bay Transportation Authority.

Richard L. Neumeier, for League of Women Voters of Massachusetts & others, amici curiae, submitted a brief.

BRAUCHER, J. The plaintiffs seek declaratory and injunctive relief against assessments upon cities and towns in the

Massachusetts Bay Transportation Authority (MBTA) district. The assessments are attributable to expenditures by the MBTA in 1979, and the plaintiffs claim that certain of the expenditures were illegal because in excess of the budget approved by the MBTA Advisory Board (Advisory Board). We hold that the plaintiffs are not entitled to relief.

1. *The proceedings.* The plaintiffs are the Advisory Board and a number of the cities and towns in the MBTA district. The complaint was filed in the Supreme Judicial Court for Suffolk County on July 9, 1980. The defendants are the MBTA, the Governor, the Commissioner of Revenue, and the Treasurer and Receiver General. In September, 1980, a single justice of this court reserved eleven questions of law for consideration by the full court, and reported the case to this court pursuant to Mass. R. Civ. P. 64, 365 Mass. 831 (1974), on the basis of pleadings, motions, affidavits and a statement of agreed facts.

2. *The facts.* The following facts are agreed. In December, 1978, the Advisory Board approved an expense budget of $274,388,061 for the calendar year 1979, reducing the budget submitted by the MBTA by more than $5 million. In July, 1979, the Advisory Board approved a supplementary budget of $10,975,522, reducing the MBTA submission by more than $15 million. At the same time it adopted resolutions that it would refuse all additional supplemental budget submissions for 1979 "except in cases of extreme emergency," that it would "tolerate no cuts in service whatever," and that the MBTA management should exert greater control over expenditures and operations. On December 17, 1979, the Advisory Board voted to reduce to zero a second supplementary budget of more than $15 million.

In mid-December, 1979, the MBTA's expenditures approached the limit of $285,363,583 approved by the Advisory Board. After the December 17 vote, the MBTA board of directors voted to commence closing down the system, and on December 18, the first MBTA vehicles were removed from service. On December 18, the Governor issued Execu-

tive Order 172, and the MBTA was operated pursuant to that order for the remainder of 1979 at a cost of $11,772,824.27. On December 27, the Advisory Board voted to notify the Governor that it would "meet any attempts to assess the member communities for costs resulting from this action with the strongest possible resistance."

In May, 1980, the MBTA notified the State Treasurer and Receiver General pursuant to G. L. c. 161A, § 12, of the "net cost of service" for 1979. Its computation of the "Assessable Net Cost of Service" was based on total current expenses that included expenses incurred under Executive Order 172. From that total, pursuant to G. L. c. 161A, § 1, there were deducted income and Federal and State assistance payments. In June, 1980, the Commissioner of Revenue issued to the plaintiff cities and towns her estimates of State assessments, charges and taxes to be levied on them pursuant to G. L. c. 59, § 21. Included were charges attributable to expenditures by the MBTA for operations during 1979.

By St. 1980, c. 329, § 2, item 6005-0011, the Legislature appropriated $83,500,000 for "additional assistance" to the MBTA, to be used by the Treasurer and Receiver General in reducing the amount of the MBTA net cost of service to be assessed on the cities and towns. Such an appropriation had been anticipated and deducted from the MBTA's computation of the "Assessable Net Cost of Service." In the Senate version that appropriation had been some $6 million less, and had been limited by the following language: "provided that only those expenditures for calendar year 1979 approved by the MBTA Advisory Board shall be reimbursed by funds appropriated herein." 1980 Sen. Doc. No. 2200. In the bill as enacted on June 25, 1980, however, the quoted language had been deleted, and the $6 million had been restored.

3. *Effect of the Executive Order.* Under G. L. c. 161A, § 5 (*i*), the MBTA is forbidden to incur expenses in excess of those in the budget approved by the Advisory Board. See *Boston* v. *Massachusetts Bay Transp. Auth.*, 373 Mass. 819,

823-824 (1977); *Massachusetts Bay Transp. Auth.* v. *Boston Safe Deposit & Trust Co.*, 348 Mass. 538, 543-544 (1965). We recently considered the effect of Executive Order 189, issued November 18, 1980, noting that "identical questions with respect to the validity and effect of Executive Order 172, issued December 18, 1979," had been fully argued in the present case. *Massachusetts Bay Transp. Auth. Advisory Bd.* v. *Massachusetts Bay Transp. Auth.*, Mass. , (1981).[a] We held that the Governor could not by executive order, in the absence of legislative authority, suspend the operation of § 5 (*i*), and that the statutes relied upon did not confer the necessary authority. We ordered the entry of a judgment declaring that, with a temporary exception not relevant here, Executive Order 189 was "beyond the powers granted to the Governor" and was "of no force or effect." *Id.* at .[b]

We therefore begin with the premise that Executive Order 172, like Executive Order 189, was beyond the powers granted to the Governor and of no force or effect. It follows that the operation of the MBTA from December 18 through December 31, 1979, was in violation of § 5 (*i*). For the purposes of the present case we accept the plaintiffs' contention that, in the absence of legislative action, the expenditure of nearly $12 million pursuant to Executive Order 172 was not part of the net cost of service to be assessed to the cities and towns in the MBTA district pursuant to G. L. c. 161A.

4. *Effect of the 1980 appropriation.* The MBTA's computation of the "Assessable Net Cost of Service" in May, 1980, came to more than $82 million. But that computation took into account $83,345,000 in additional State assistance "subject to Legislative Approval," and nearly $12 million in expenses pursuant to Executive Order 172. If those two items were eliminated, the cost assessable pursuant to G. L. c. 161A would come to more than $153 million. Ac-

[a] Mass. Adv. Sh. (1981) 403, 408.

[b] Mass. Adv. Sh. (1981) at 404.

tual assessments to the cities and towns in the MBTA district are not included in the record before us, but it seems clear that they are in the vicinity of $82 million.

The plaintiffs' complaint alleges that in recent years "only half the net cost of service has been assessed upon the cities and towns; the other half has been annually appropriated by the General Court." Those allegations are denied by the MBTA; the State defendants (the Governor, Treasurer and Receiver General, and Commissioner of Revenue) deny that the funds appropriated "were either explicitly or implicitly intended to represent exactly one half of the net cost of service." Apparently on the same basis, the plaintiffs allege that some $5.8 million of the estimates of State assessments issued by the Commissioner of Revenue in June, 1980, were attributable to expenses incurred by the MBTA pursuant to Executive Order 172. That allegation is not admitted by the defendants, and it has no other support in the record before us.

We infer that the Legislature in 1980 intended to appropriate as "additional assistance" approximately — but not exactly — one half of the MBTA's net cost of service for 1979. The Senate version would have excluded expenditures pursuant to Executive Order 172 from the expenditures to be reimbursed by the appropriation. The deletion of the limitation proposed by the Senate made it clear that there was no such exclusion. Thus the cities and towns in the MBTA district were to be assessed in the amount remaining after the "additional assistance" had been deducted from total MBTA expenditures, including expenditures pursuant to Executive Order 172.

The defendants contend that the Legislature "ratified" the unauthorized expenditures made pursuant to Executive Order 172. We agree with the plaintiffs that the legislation was not in appropriate form for authorization or ratification. Compare St. 1972, c. 646, and St. 1980, c. 581, § 18, for appropriate forms of authorization or ratification. But the legislative intent seems clear, and the practical effect was the same as that of ratification. The action of the Leg-

islature was well within its broad power to allocate financial burdens among municipalities. *Springfield* v. *Assessors of Granville*, Mass. , (1979).[c] *Thompson* v. *Chelsea*, 358 Mass. 1, 8 (1970). Since the Legislature was under no obligation to appropriate any "additional assistance," the cities and towns are to pay less than their obligation under G. L. c. 161A, and there has been no violation of their legal rights.

5. *Disposition.* In view of what we have said, we think it unnecessary to answer the questions reported to us. The case is remanded to the county court, where a judgment is to be entered declaring that the plaintiffs are not entitled to relief against the assessments for net cost of service of the MBTA for the calendar year 1979.

So ordered.

[c] Mass. Adv. Sh. (1979) 1358, 1363.

Chap. 405. AN ACT RELATIVE TO INTEREST ARBITRATION PROCEDURES BETWEEN EMPLOYEE ORGANIZATIONS AND THE DIRECTORS OF THE MASSACHUSETTS BAY TRANSPORTATION AUTHORITY.

Be it enacted, etc., as follows:

SECTION 1. Section 19 of chapter 161A of the General Laws, as appearing in section 18 of chapter 563 of the acts of 1964, is hereby amended by striking out the second sentence and inserting in place thereof the following sentence:- Except as provided in sections nineteen C to nineteen G, inclusive, the employees of the authority shall submit all grievances and disputes pursuant to arbitration provisions in agreement existing at the time of the creation of the authority or subsequently entered into with the authority or, in the absence of such provisions, to the state board of conciliation and arbitration, or other board or body having similar powers and duties.

The Commonwealth of Massachusetts

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Chap. 405. Paul Guzzi
Secretary of the Commonwealth

SECTION 2. Said chapter 161A is hereby further amended by inserting after section 19B the following five sections:-

Section 19C. Notwithstanding the provisions of sections nineteen and nineteen A, the authority or any organizations representing employees of the authority shall not be permitted to submit any dispute over the terms of a collective bargaining agreement to arbitration except in accordance with sections nineteen C through nineteen G, inclusive; provided, however, that this section shall not limit the rights of organizations representing employees of the authority to submit grievances to arbitration in accordance with the collective bargaining agreement between the parties.

Section 19D. In the event the directors and any organizations representing employees of the authority have not reached an agreement within ninety days from the date of the expiration of the agreement, either party may notify the other that it desires mediation. The parties may agree upon a person to serve as a mediator or, if unable to agree on said mediator, either party or the parties acting jointly may petition the board of conciliation and arbitration to appoint a mediator from a list of qualified persons maintained by the board.

After a reasonable period of mediation, not to exceed forty-five days from the date of appointment, said mediator shall issue a report indicating the results of his services in resolving the impasse. If at the conclusion of mediation, the mediator certifies that the impasse still exists, either party may notify the other that it desires arbitration of the matters in dispute. Within ten days of said notice, the parties shall meet to select a single neutral arbitrator. If, within fifteen days, the parties fail to select such single arbitrator, either party may forthwith petition the board of conciliation and arbitration to request a list of five arbitrators from the American Arbitration Association and said Association shall certify to the board that such arbitrators on the list it provides possess the qualifications as provided in section nineteen E. The parties shall thereupon meet to select such arbitrator by striking one name each until one name remains and that person shall serve as the neutral arbitrator. If after ten days, if one of the parties declines to strike their names, the other party shall strike two names and the board shall forthwith select the arbitrator from the remaining three names.

Section 19E. The single arbitrator, whether agreed upon by the parties or selected by the board of conciliation and arbitration, shall be a legal resident of the commonwealth and shall be experienced in state and local finance.

Section 19F. The arbitrator shall rely primarily on the following factors in determining the basis for an award:

1. The financial ability of the authority to meet additional costs, which shall include but not be limited to:

a. the statutory requirement of advisory board approval of the authority's fiscal budget;

b. the financial ability of the individual communities and the commonwealth to meet additional costs;

c. the average per capita tax burden, average annual income and sources of revenue within the commonwealth, and the effect of any arbitration award on the respective property tax rates of the cities and towns within the authority's district.

2. The overall compensation presently received by the employees, having regard not only for wages for time actually worked but also for wages for time not worked, including vacations, holidays and other excused time.

3. All benefits received by the employees, including insurance, pension, as well as the continuity and stability of employment.

4. The hazards of employment, physical, educational and mental qualifications, job training and skills involved.

5. A comparison of wages, hours, and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services within the commonwealth and with other employees generally in public and private employment within the commonwealth.

6. The average consumer price for goods and services, commonly known as the cost of living.

7. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

8. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between parties, in the public service of the commonwealth.

9. The stipulation of the parties.

Section 19G. Within thirty calendar days of an award, the arbitrator shall issue a written opinion inclusive of an analysis of all statutory factors applicable to the proceedings. Any determination by the arbitrator, if supported by material and substantial evidence on the record, shall be binding upon the parties and upon the appropriate legislative or appropriating body and may be enforced at the insistence of either party or by the arbitrator in the superior court. The scope of arbitration shall be limited to wages, hours, and conditions of employment and shall not include any provisions for any cost of living adjustments which are based on changes in the Consumer Price Index after the expiration of the contract period covered by the award. In addition, any wage or salary adjustments shall be expressed

The Commonwealth of Massachusetts

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Paul Guzzi
Chap. 405. Secretary of the Commonwealth

in per cent or dollar amounts, and in no case shall there be any provision for salary adjustments to occur after the expiration of the contract period covered by the award.

The cost, if any, of the mediation and of arbitration proceedings exclusive of the expenses of the individual parties provided for under sections nineteen C through nineteen G shall be divided equally by the parties and shall be in accordance with a schedule of payments established by the American Arbitration Association.

SECTION 3. Notwithstanding the provisions of any special or general law to the contrary, there shall be no salary adjustment awarded to any management employees of the authority for a period of eighteen months from the effective date of this act.

SECTION 4. The provisions of this act are severable, and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions.

SECTION 5. This act shall take effect upon its passage.

Approved July 13, 1978

The Commonwealth of Massachusetts

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Chap. 581 Secretary of the Commonwealth

Chap. 581. AN ACT RELATIVE TO THE STRUCTURE OF THE MASSACHUSETTS BAY TRANSPORTATION AUTHORITY.

Be it enacted, etc., as follows:

The Commonwealth of Massachusetts

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Michael Joseph Connolly
Chap. 581 Secretary of the Commonwealth

SECTION 8. Section 19 of said chapter 161A is hereby amended by striking out the first sentence, as appearing in section 18 of chapter 563 of the acts of 1964, and inserting in place thereof the following sentences:- The directors shall have authority to bargain collectively with labor organizations representing employees of the authority and to enter into agreements, with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of such employees; provided, however, that the directors shall have no authority to bargain collectively and shall have no authority to enter into collective bargaining agreements with respect to matters of inherent management right which shall include the right:

(i) to direct, appoint, employ, assign and promote officers, agents and employees and to determine the standards therefor.

(ii) (A) to discharge and terminate employees subject to the provisions of such clauses (B) and (C).

(B) No action set forth in (A) shall be sustained if, in a proceeding invoked in accordance with the provisions of such clause (C), the employee shall establish by a preponderance of the evidence that it was based upon race, color, religion, sex, age, national origin, handicapping condition, marital status, or political affiliation or activities or union activities or union organizing of the employees; a reprisal against the employee for disclosure of information by an employee which the employee reasonably believes evidences a violation of any law, rule or regulation or mismanagement, a gross waste of funds, or abuse

of authority; a reprisal against any employee for the refusal of any person to engage in political activity.

(C) The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration which may be invoked in the event any employee of the authority is aggrieved by any action taken under such clause (A).

(iii) to plan and determine the levels of service provided by the authority.

(iv) to direct, supervise, control, and evaluate the departments, units, and programs of the authority; to classify the various positions of the authority and ascribe duties and standards of productivity therefor.

(v) to develop and determine levels of staffing and training.

(vi) to determine whether goods or services should be made, leased, contracted for, or purchased on either a temporary or permanent basis.

(vii) to assign and apportion overtime.

(viii) to hire part-time employees.

The authority is hereby prohibited from bargaining collectively or entering into any agreement to make pension benefit payments to its employees that are determined in a manner that includes the amount of overtime earnings of said employees.

The authority is hereby prohibited from bargaining collectively or entering into a contract which provides for automatic cost-of-living salary adjustments which are based on changes in the Consumer Price Index or other similar adjustments unless specifically authorized by law.

SECTION 9. Section 19F of said chapter 161A, as appearing in section 2 of chapter 405 of the acts of 1978, is hereby amended by striking out paragraph 8 and inserting in place thereof the following paragraph:-

8. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between parties, in the public service of the commonwealth, and which are not precluded from bargaining under section nineteen.

The Commonwealth of Massachusetts

Advance Copy 1980 Acts and Resolves
Michael Joseph Connolly
Chap. 581 Secretary of the Commonwealth

SECTION 12. Said chapter 161A is hereby further amended by striking out section 29, as appearing in section 18 of chapter 563 of the acts of 1964, and inserting in place thereof the following section:-

Section 29. The authority is authorized and directed from time to time to take all necessary action to secure any federal assistance which is or may become available to the commonwealth or any of its political subdivisions, for any of the purposes of this chapter. If any federal law, administrative regulations or practice requires any action relating to such federal assistance to be taken by any department or instrumentality of the commonwealth other than the authority, such other department or instrumentality is authorized and directed to take all such action, including without limitation filing applications for assistance, supervising the expenditure of federal grants or loans to the foregoing, and the authority is hereby authorized and directed to take all actions which are not inconsistent with state law and which are necessary to permit such other department or instrumentality to comply with federal requirements. If the provisions of any federal law, administrative regulation, or practice governing federal assistance for the purposes of this chapter are inconsistent with any provisions of this chapter to the extent that the commonwealth or its political subdivisions are prohibited or potentially prohibited from receiving such assistance, the chairman of the authority shall, within thirty days after the federal government has notified him that an inconsistency may exist, notify the governor, and the clerks of the house and senate of such inconsistency.

The Commonwealth of Massachusetts

Advance Copy 1980 Acts and Resolves
Michael Joseph Connolly
Chap. 581 Secretary of the Commonwealth

The Commonwealth of Massachusetts

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Michael Joseph Connolly
Chap. 581 Secretary of the Commonwealth

§ 3. Additional Powers.

In addition to all powers otherwise granted to the authority by law, the authority shall have the following powers, in each case to be exercised by the directors of the authority unless otherwise specifically provided:

(a) To adopt and use a corporate seal and designate the custodian thereof.

(b) To establish within its area a principal office and such other offices as may be deemed necessary.

(c) To hold, operate and manage the mass transportation facilities and equipment acquired by the authority.

(d) To appoint and employ officers, including a general manager, agents, and employees to serve at the pleasure of the directors, except as may otherwise be provided in collective bargaining agreements, and to fix their compensation and conditions of employment; provided, however, the authority may bind itself by contract to employ not more than five senior officers but no such contract shall be for a period of more than five years. The advisory board shall approve the appointment of a general manager.

The authority shall annually, on or before January first, submit a schedule of salaries of all its employees and any proposed increases therein to the secretary of administration for his review. Said secretary may make recommendations to the authority on said salary structure and shall advise the authority of the prevailing rates that the commonwealth pays for similar services. (Amended by 1980, 581, § 2, approved December 7, 1980, effective by act of Governor December 8, 1980.)

(e) To make, and from time to time revise and repeal, by-laws, rules, regulations and resolutions.

(f) To enter into agreements with other parties, including, without limiting the generality of the foregoing, government agencies, municipalities, authorities, private transportation companies, railroads, and other concerns, providing (i) for construction, operation and use of any mass transportation facility and equipment held or later acquired by the authority; provided, however, that any agreement entered into by the authority for the construction or acquisition of mass transportation facilities or equipment of more than one million dollars, which is financed in whole or in part from the proceeds of bonds the debt service payments on which are assisted by the commonwealth, shall not become effective until approved by the secretary of transportation; and provided, further, that said secretary shall notify the secretary of administration and finance of any such approval; (ii) for joint or co-operative operation of any mass transportation facility and equipment with another party; (iii) for operation and use

of any mass transportation facility and equipment for the account of the authority, for the account of another party or for their joint account: or (iv) for the acquisition of any mass transportation facility and equipment of another party where the whole or any part of the operations of such other party takes place within the area constituting the authority. Any such other party is hereby given power and authority to enter into any such agreements, subject to such provisions of law as may be applicable. Any agreement with a private company under any provision of this chapter which is to be financed from the proceeds of bonds or bond anticipation notes and which provides for the rendering of transportation service by such company and for financial assistance to such company by subsidy, lease or otherwise, shall include such standards for such service as the authority may deem appropriate and shall not bind the authority for a period of longer than one year from its effective date, but this shall not prohibit agreements for longer than one year if the authority's obligations thereunder are subject to annual renewal or annual cancellation by the authority. Such agreements may provide for cash payments for services rendered, but not more than will permit any private company a reasonable return. (Amended by 1979, 480, § 13, approved, with emergency preamble, Aug. 10, 1979.)

(g) To establish at or near its terminals and stations such off-street parking facilities and access roads as may be deemed necessary and desirable. The authority may charge such fees for the use of such facilities as it may deem desirable, or it may allow the use of such facilities free.

(h) To accept gifts, grants and loans from agencies of local, state and federal governments, or from private agencies or persons, and to accede to such conditions and obligations as may be imposed as a prerequisite to any such gift, grant or loan.

(i) To provide mass transportation service, whether directly, jointly or under contract, on an exclusive basis, except as provided in paragraph *(k)* of section five, in the area constituting the authority and without being subject to the jurisdiction and control of the department of public utilities in any manner except as to safety of equipment and operations and, with respect only to operations of the authority with equipment owned and operated by the authority, without, except as otherwise provided in this chapter, being subject to the jurisdiction and control of any city or town or other licensing authority; provided that schedules and routes shall not be considered matters of safety subject to the jurisdiction and control of said department. Except as otherwise provided in this chapter, the directors of the authority shall determine the character and extent of the

services and facilities to be furnished, and in these respects their authority shall be exclusive and shall not be subject to the approval, control or direction of any state, municipal or other department, board or commission. Nothing contained in this paragraph shall be construed as exempting any privately owned or controlled carrier, whether operating independently, jointly or under contract with the authority, from obtaining any license required under section one of chapter one hundred and fifty-nine A.

(j) To operate mass transportation facilities and equipment, directly or under contract in areas outside the area constituting the authority; but only pursuant to (i) an agreement with or purchase of a private mass transportation company, part of whose operations were, at the time the authority was established, within the area constituting the authority or (ii) an agreement with a transportation area or a municipality for service between the area of the authority and that of such transportation area or municipality, where no private company is otherwise providing such service.

(k) To provide for construction, extension, modification or improvement of the mass transportation facilities in the area constituting the authority; provided, however, that any such construction, extension, modification or improvement shall be consistent with the program and plans for mass transportation, as developed by the department under paragraph *(g)* of section five, as approved by the advisory board, unless specifically authorized by legislation.

(l) Consistent with the program and plans for public mass transportation as provided in paragraph *(g)* of section five, to conduct research, surveys, experimentation, evaluation, design and development, in cooperation with the department, and other governmental agencies and private organizations when appropriate, with regard to mass transportation facilities, equipment and services.

(m) To grant such easements over any real property held by the authority as will not in the judgment of the authority unduly interfere with the operation of any of its mass transportation facilities.

(n) To sell, lease, or otherwise contract for advertising in or on the facilities of the authority.

(o) To take real property by eminent domain in accordance with the provisions of chapter seventy-nine or chapter eighty A; provided that land devoted to any public use other than mass transportation

may be taken by the authority only (i) if any substantial interference with such public use is temporary or any permanent interference therewith is not substantial, or both, or (ii) in the case of takings not authorized by clause (i), upon providing equivalent land for such public use. Interference with the public use of a street or public utility line shall not be considered to be substantial unless the interference with the traffic or utility system of which it is a part is substantial.

(p) To issue bonds, notes and other evidences of indebtedness as hereinafter provided.

(q) Consistent with the constitution and laws of the commonwealth, the authority shall have such other powers, including the power to buy, sell, lease, pledge and otherwise deal with real and personal property, as may be necessary for or incident to carrying out the foregoing powers and the accomplishment of the purposes of this chapter.

(r) The authority may enter into contracts or agreements with the department or with any agency, authority or political subdivision of the commonwealth for the provision, at cost, of specified services either by the authority or by the department or such agency, authority, or political subdivision of the commonwealth. Such services may include, but are not limited to the following: feasibility and needs studies, transportation and construction planning, family and business relocation, and the conduct or supervision of design, construction, maintenance, management or land acquisition. Any such contract shall specify the manner of, and procedure for, payment or reimbursement for services provided or to be provided. All such agencies, authorities or political subdivisions are authorized to enter into such contracts with the authority. (1964, 563, § 18; 1965, 882; 1973, 1140, §§ 3–6.)

§ 3. Additional powers of authority

In addition to all powers otherwise granted to the authority by law, the authority shall have the following powers, in each case to be exercised by the directors of the authority unless otherwise specifically provided:

[See main volume for text of (a) to (c)]

(d) To appoint and employ officers, including a general manager, agents, and employees to serve at the pleasure of the directors, except as may otherwise be provided in collective bargaining agreements, and to fix their compensation and conditions of employment; provided, however, the authority may bind itself by contract to employ not more than five senior officers but no such contract shall be for a period of more than five years. The advisory board shall approve the appointment of a general manager.

The authority shall annually, on or before January first, submit a schedule of salaries of all its employees and any proposed increases therein to the secretary of administration for his review. Said secretary may make recommendations to the authority on said salary structure and shall advise the authority of the prevailing rates that the commonwealth pays for similar services.

[See main volume for text of (e)]

(f) To enter into agreements with other parties, including, without limiting the generality of the foregoing, government agencies, municipalities, authorities, private transportation companies, railroads, and other concerns, providing (i) for construction, operation and use of any mass transportation facility and equipment held or later acquired by the authority; (ii) for joint or co-operative operation of any mass transportation facility and equipment with another party; (iii) for operation and use of any mass transportation facility and equipment for the account of the authority, for the account of another party or for their joint account; or (iv) for the acquisition of any mass transportation facility and equipment of another party where the whole or any part of the operations of such other party takes place within the area constituting the authority; provided, however, that any agreement entered into by the authority for the construction or acquisition of mass transportation facilities or equipment of more than one million dollars, which is financed in whole or in part from the proceeds of bonds the debt service payments on which are assisted by the commonwealth, shall not become effective until approved by the secretary of transportation; and provided, further, that said secretary shall notify the secretary of administration and finance of any such approval. Any such other party is hereby given power and authority to enter into any such agreements, subject to such provisions of law as may be applicable. Any agreement with a private company under any provision of this chapter which is to be financed from the proceeds of bonds or bond anticipation notes and which provides for the rendering of transportation service by such company and for financial assistance to such company by subsidy, lease or otherwise, shall include such standards for such service as the authority may deem appropriate and shall not bind the authority for a period of longer than one year from its effective date, but this shall not prohibit agreements for longer than one year if the authority's obligations thereunder are subject to annual renewal or annual cancellation by the authority. Such agreements may provide for cash payments for services rendered, but not more than will permit any private company a reasonable return.

[See main volume for text of (g) to (r)]

Amended by St.1979, c. 480, § 13; St.1980, c. 581, § 2.

1979 Amendment. St.1979, c. 480, § 13, an emergency act, approved Aug. 10, 1979, added the provisions appearing in the proviso to the first sentence of par. (f).

1980 Amendment. St.1980, c. 581, § 2, in par. (d), in the first paragraph, inserted ", including a general manager," in the first sentence, and added the second sentence.

§ 19. Employees; collective bargaining; arbitration; applicable provisions

The directors shall have authority to bargain collectively with labor organizations representing employees of the authority and to enter into agreements with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of such employees. The employees of the authority shall submit all grievances and disputes pursuant to arbitration provisions in agreements existing at the time of the creation of the authority or subsequently entered into with the authority, or, in the absence of such provisions, to the state board of conciliation and arbitration, or other board or body having similar powers and duties. The provisions of general or special laws relative to rates of wages, hours of employment and working conditions of public employees and relating to contracts for public works, shall not apply to the authority nor to the employees thereof, nor to employees of contractors with the authority but the authority and its employees shall be governed with respect to hours of employment, rates of wages, salaries, hours,

working conditions, health benefits, pensions and retirement allowances of its employees and with respect to contracts for construction, maintenance and repair by the laws relating to street railway companies.

Added by St.1964, c. 563, § 18.

§ 19A. State labor relations law; applicability

Notwithstanding any provisions of law to the contrary, the provisions of section five of chapter one hundred and fifty A shall so far as apt apply to the authority and its employees, excepting directors, executives and those confidential employees representing the authority and dealing with employee organizations. Nothing in this section shall be construed as conferring upon the employees of the authority the right to strike, nor as detracting from the obligations of the authority and the employees to submit all grievances and other disputes to arbitration.

Added by St.1970, c. 514.

§ 19. Employees; collective bargaining; arbitration; applicable provisions

The directors shall have authority to bargain collectively with labor organizations representing employees of the authority and to enter into agreements, with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of such employees; provided, however, that the directors shall have no authority to bargain collectively and shall have no authority to enter into collective bargaining agreements with respect to matters of inherent management right which shall include the right:

(*i*) to direct, appoint, employ, assign and promote officers, agents and employees and to determine the standards therefor.

(*ii*) (A) to discharge and terminate employees subject to the provisions of such clauses (B) and (C).

(B) No action set forth in (A) shall be sustained if, in a proceeding invoked in accordance with the provisions of such clause (C), the employee shall establish by a preponderance of the evidence that it was based upon race, color, religion, sex, age, national origin, handicapping condition, marital status, or political affiliation or activities or union activities or union organizing of the employees; a reprisal against the employee for disclosure of information by an employee which the employee reasonably believes evidences a violation of any law, rule or regulation or mismanagement, a gross waste of funds, or abuse of authority; a reprisal against any employee for the refusal of any person to engage in political activity.

(C) The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration which may be invoked in the event any employee of the authority is aggrieved by any action taken under such clause (A).

(*iii*) to plan and determine the levels of service provided by the authority.

(*iv*) to direct, supervise, control, and evaluate the departments, units, and programs of the authority; to classify the various positions of the authority and ascribe duties and standards of productivity therefor.

(*v*) to develop and determine levels of staffing and training.

(*vi*) to determine whether goods or services should be made, leased, contracted for, or purchased on either a temporary or permanent basis.

(*vii*) to assign and apportion overtime.

(*viii*) to hire part-time employees.

The authority is hereby prohibited from bargaining collectively or entering into any agreement to make pension benefit payments to its employees that are determined in a manner that includes the amount of overtime earnings of said employees.

The authority is hereby prohibited from bargaining collectively or entering into a contract which provides for automatic cost-of-living salary adjustments which are based on changes in the Consumer Price Index or other similar adjustments unless specifically authorized by law. Except as provided in sections nineteen C to nineteen G, inclusive, the employees of the authority shall submit all grievances and disputes pursuant to arbitration provisions in agreement existing at the time of the creation of the authority or subsequently entered into with the authority or, in the absence of such provisions, to the state board of conciliation and arbitration, or other board or body having similar powers and duties. The provisions of general or special laws relative to rates of wages, hours of employment and working conditions of public employees, shall not apply to the authority nor to the employees thereof, but the authority and its employees shall be governed with respect to hours of employment, rates of wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of its employees by the laws relating to street railway companies.

Amended by St.1977, c. 970, § 2; St.1978, c. 405, § 1; St.1980, c. 581, § 10.

§ 19D. Mediation; selection of mediator; report; selection of arbitrator

In the event the directors and any organizations representing employees of the authority have not reached an agreement within ninety days from the date of the expiration of the agreement, either party may notify the other that it desires mediation. The parties may agree upon a person to serve as a mediator or, if unable to agree on said mediator, either party or the parties acting jointly may petition the board of conciliation and arbitration to appoint a mediator from a list of qualified persons maintained by the board.

After a reasonable period of mediation, not to exceed forty-five days from the date of appointment, said mediator shall issue a report indicating the results of

his services in resolving the impasse. If at the conclusion of mediation, the mediator certifies that the impasse still exists, either party may notify the other that it desires arbitration of the matters in dispute. Within ten days of said notice, the parties shall meet to select a single neutral arbitrator. If, within fifteen days, the parties fail to select such single arbitrator, either party may forthwith petition the board of conciliation and arbitration to request a list of five arbitrators from the American Arbitration Association and said Association shall certify to the board that such arbitrators on the list it provides possess the qualifications as provided in section nineteen E. The parties shall thereupon meet to select such arbitrator by striking one name each until one name remains and that person shall serve as the neutral arbitrator. If after ten days, if one of the parties declines to strike their names, the other party shall strike two names and the board shall forthwith select the arbitrator from the remaining three names.
Added by St.1978, c. 405, § 2.

§ 19F. Factors in determining the basis for award

The arbitrator shall rely primarily on the following factors in determining the basis for an award:

1. The financial ability of the authority to meet additional costs, which shall include but not be limited to:

a. the statutory requirement of advisory board approval of the authority's fiscal budget;

b. the financial ability of the individual communities and the commonwealth to meet additional costs;

c. the average per capita tax burden, average annual income and sources of revenue within the commonwealth, and the effect of any arbitration award on the respective property tax rates of the cities and towns within the authority's district.

2. The overall compensation presently received by the employees, having regard not only for wages for time actually worked but also for wages for time not worked, including vacations, holidays and other excused time.

3. All benefits received by the employees, including insurance, pension, as well as the continuity and stability of employment.

4. The hazards of employment, physical, educational and mental qualifications, job training and skills involved.

5. A comparison of wages, hours, and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services within the commonwealth and with other employees generally in public and private employment within the commonwealth.

6. The average consumer price for goods and services, commonly known as the cost of living.

7. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

8. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between parties, in the public service of the commonwealth, and which are not precluded from bargaining under section nineteen.

9. The stipulation of the parties.

Added by St.1978, c. 405, § 2. Amended by St.1980, c. 581, § 9.

§ 19G. Written opinion of arbitrator; binding nature; scope of arbitration; cost of mediation and arbitration

Within thirty calendar days of an award, the arbitrator shall issue a written opinion inclusive of an analysis of all statutory factors applicable to the proceedings. Any determination by the arbitrator, if supported by material and substantial evidence on the record, shall be binding upon the parties and upon the appropriate legislative or appropriating body and may be enforced at the insistence of either party or by the arbitrator in the superior court. The scope of arbitration shall be limited to wages, hours, and conditions of employment and shall not include any provisions for any cost of living adjustments which are based on changes in the Consumer Price Index after the expiration of the contract period covered by the award. In addition, any wage or salary adjustments shall be expressed in per cent or dollar amounts, and in no case shall there be any provision for salary adjustments to occur after the expiration of the contract period covered by the award.

The cost, if any, of the mediation and of arbitration proceedings exclusive of the expenses of the individual parties provided for under sections nineteen C through nineteen G shall be divided equally by the parties and shall be in accordance with a schedule of payments established by the American Arbitration Association.

Added by St.1978, c. 405, § 2.

§ 29. Federal assistance

The authority is authorized and directed from time to time to take all necessary action to secure any federal assistance which is or

may become available to the commonwealth or any of its subdivisions for any of the purposes of this chapter. If any federal law, administrative regulation or practice requires any action relating to such federal assistance to be taken by any department or instrumentality of the commonwealth other than the authority, such other department or instrumentality is authorized and directed to take all such action, including without limitation filing applications for assistance, supervising the expenditure of federal grants or loans and making any determinations and certifications necessary or appropriate to the foregoing, and the authority is authorized and directed to take all action necessary to permit such other department or instrumentality to comply with all federal requirements. It is the intent of this section that the provisions of any federal law, administrative regulation or practice governing federal assistance for the purposes of this chapter shall, to the extent necessary to enable the commonwealth or its subdivisions to receive such assistance and not constitutionally prohibited, override any inconsistent provisions of this chapter.

Added by St.1964, c. 563, § 18.

§ 29. Federal assistance

The authority is authorized and directed from time to time to take all necessary action to secure any federal assistance which is or may become available to the commonwealth or any of its political subdivisions, for any of the purposes of this chapter. If any federal law, administrative regulations or practice requires any action relating to such federal assistance to be taken by any department or instrumentality of the commonwealth other than the authority, such other department or instrumentality is authorized and directed to take all such action, including without limitation filing applications for assistance, supervising the expenditure of federal grants or loans to the foregoing, and the authority is hereby authorized and directed to take all actions which are not inconsistent with state law and which are necessary to permit such other department or instrumentality to comply with federal requirements. If the provisions of any federal law, administrative regulation, or practice governing federal assistance for the purposes of this chapter are inconsistent with any provisions of this chapter to the extent that the commonwealth or its political subdivisions are prohibited or potentially prohibited from receiving such assistance, the chairman of the authority shall, within thirty days after the federal government has notified him that an inconsistency may exist, notify the governor, and the clerks of the house and senate of such inconsistency. Amended by St.1980, c. 581, § 12.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
No. 52672

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO,

PLAINTIFF

v.

COMPLAINT

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,

DEFENDANT

1. The plaintiff, Local Division 589, is the local union for bus operators and most other employees of the Massachusetts Bay Transportation Authority (hereinafter "MBTA").

2. The defendant, MBTA, is a body politic and corporate and a political subdivision of the Commonwealth, with the power to sue and be sued under G.L. c. 161A, § 2, with a principal office in Boston in the County of Suffolk.

3. The MBTA has announced it will commence on January 16, 1982, to hire part-time bus operators and has refused to arbitrate with plaintiff over the wages, hours and conditions of employment of such operators.

4. The MBTA justifies its refusal to arbitrate by invocation of c. 581 of the Acts of 1980. That statute, while it does take away the MBTA's power in future contract negotiations to bargain over the right to hire part-time employees, does not relieve it of the duty of bargain collectively with labor organizations over wages, hours and working conditions. Instead, it

specifically authorizes such bargaining which, in the case of public employees who have no right to strike, necessarily includes arbitration:

> "The directors shall have authority to bargain collectively with labor organizations representing employees of the authority and to enter into agreements with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of such employees." Acts of 1980, c. 581, Section 8.

In addition, G.L. c. 161A, § 19C, specifically calls for both grievance and interest (contract negotiation) arbitration.

5. The MBTA's proposal to hire part-time employees at this time violates the terms of its existing contract with the plaintiff. That agreement provides, in Sections 115 and 422, for a full, 40-hour work week for all employees:

> **SECTION 115**
>
> **WORK WEEK**
>
> "The regular work week for Car, Train, Bus and Trackless Trolley Service employees shall consist of five (5) days of eight (8) hours' platform work, . . . and the regular work week for miscellaneous employees shall consist of five (5) days of eight (8) hours' work, . . . all at flat time rate of pay; . . ."

SECTION 422

WORKING HOURS

"The regular work week for miscellaneous employees in the Rapid Transit Equipment Maintenance Department, the Surface Equipment Maintenance Department, the Maintenance Shops Department and the Engineering and Maintenance Department shall consist of five (5) days of eight (8) hours' work, inclusive of fifteen (15) minutes clean-up time per day, all at flat-time rate of pay."

"The work week for Plumbers and Plumbers' Helpers shall be confined to five (5) days, Monday through Friday, inclusive, to correspond with hours of other employees in the Engineering and Maintenance Department."

6. The MBTA's proposed conduct is inconsistent with the past practices and reasonable expectations of the parties. See Affidavit of John J. Gallahue, Jr., attached hereto marked "A" and incorporated herein by reference.

7. The hiring of part-time bus operators in violation of the terms of the parties' collective bargaining agreement will cause irreparable harm to present MBTA employees by correspondingly eliminating full-time positions. The refusal to arbitrate conditions of employment of part-time employees will cause them irreparable injury by eliminating the grievance procedure as to them, subject them to summary and capricious firing, and free management to ignore and override established work safety procedures to the jeopardy of all MBTA employees and the public as well.

8. Plaintiff is informed and believes that a significant minority of its membership, denied the right to strike by statute

and denied the offsetting right to binding arbitration by the MBTA's obdurate refusal to arbitrate, will, despite the admonitions and contrary to the advice of its duly elected officers, initiate undefined job actions which would incapacitate the public transit system, if the MBTA is not prevented from unilaterally hiring part-timers, and from refusing to arbitrate wages, hours and conditions of employment for part-timers when their hiring becomes permissible.

9. Plaintiff and the commuting public will suffer immediate and irreparable injury if the MBTA's proposed conduct is not enjoined.

WHEREFORE, plaintiff prays:

1. For a short order of notice requiring the MBTA to come into Court and show cause why preliminary injunctions under Prayers 2 and 3 should not be granted.

2. For a preliminary injunction, after hearing, enjoining the MBTA from hiring part-time bus operators.

3. For a preliminary injunction, after hearing, enjoining the MBTA from refusing to arbitrate with plaintiff the wages, hours and working conditions of part-time bus operators.

4. For a permanent injunction, after trial on the merits, enjoining the MBTA from hiring part-time bus operators.

5. For a permanent injunction, after hearing, enjoining the MBTA from refusing to arbitrate with plaintiff the wages, hours and working conditions of part-time bus operators.

6. For such other relief as may be just.

By his attorneys,
DiMENTO & SULLIVAN

January 12, 1982

/s/ _____

James J. Sullivan, Jr.
100 State Street
Boston, Massachusetts 02109
(617) 523-5253

VERIFICATION

I, John J. Gallahue, Jr., verify under the pains and penalties of perjury that I have read the foregoing Complaint and all allegations of fact therein are true, of my own personal knowledge, this twelfth day of January, 1982.

/s/ _____
John J. Gallahue, Jr.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS JANUARY 12, 1982

The appeared the above-named John J. Gallahue, Jr., and made oath that the foregoing is true to the best of his knowledge and belief.

/s/ _____
Notary Public

My commission expires: 3/30/85

Amicus Brief

5

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. ... CLERK

No. 81-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE,
Petitioners,

vs.

LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER ON BEHALF OF THE METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY

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QUESTIONS PRESENTED

1. Whether Congress, in enacting the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601, *et seq.*, intended to create a federal transit labor law enforceable in, and by, federal courts to govern contract disputes between public transit authorities and their employees.

2. Whether Congress, in enacting the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601, *et seq.*, intended to authorize federal courts to formulate a "federal common law" to govern contract disputes between local public transit authorities and their employees.

3. Whether an employee's, or union's, claim that a municipal transit authority breached a collective bargaining agreement executed in 1975 states a "claim arising under the laws of the United States" within the meaning of 28 U.S.C. § 1331(a) solely because the municipal transit authority received federal funds, in 1966, through a grant authorized by the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601, *et seq.*

4. Whether Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1609(c), creates a federal private cause of action for an alleged breach of a collective bargaining agreement, executed in 1975, by a municipal transit operator who received federal funds under the Act, in 1966.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	7
There Is No Federal Private Right Of Action Under Section 13(c) Of The Urban Mass Transportation Act Of 1964	7
CONCLUSION	19

TABLE OF AUTHORITIES

Cases

California v. Sierra Club, 68 L.Ed.2d 101 (1981) 7

Cannon v. University of Chicago, 441 U.S. 677 (1979) 4, 11, 16, 17

City of Atlanta v. Metropolitan Atlanta Rapid Transit Authority, 506 F. Supp. 883 (N.D. Ga. 1980), *aff'd* 636 F.2d 1084 (5th Cir. 1981) 5

Cort v. Ash, 422 U.S. 66 (1975) 7, 16, 17

Division 589, Amal. Transit Union v. Massachusetts (1st Cir. Nos. 81-1180, -1198, -1219, Sept. 30, 1981) 13, 15

Div. 1287, Amal. Transit Union, AFL-CIO v. Kansas City Area Transportation Authority, 581 F.2d 444 (8 Cir. 1978), cert. denied, 439 U.S. 1090 (1979) 3

International Ass'n. of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963) 7, 17

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TABLE OF AUTHORITIES (Continued)

Cases (Continued) — **Page**

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National R.R. Passenger Corp. v. Nat'l. Ass'n. of R.R. Passengers, 414 U.S. 453 (1974) 10

Nemitz v. Norfolk & Western Ry. Co., 287 F. Supp. 221 (N.D. Ohio 1968) 10

Norfolk & Western R.R. v. Nemitz, 404 U.S. 37 (1971) 10

Pennhurst State Schools v. Halderman, 67 L.Ed.2d 694 (1981) 7

Touche Ross & Co. v. Reddington, 442 U.S. 560 (1979) 7, 8, 10, 11, 16

TABLE OF AUTHORITIES (Continued)

Page

Cases (Continued)

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Universities Research Ass'n., Inc. v. Coutu, 67 L.Ed.2d 662 (1981) 10, 11

Statutes and Other Authorities

Amtrak Act, 45 U.S.C. §§547(a), 565 10

Civil Rights Act of 1871, 42 U.S.C. §1983 5

29 CFR §215.3(a)(2) 13

109 Congressional Record (1963) 12, 15

110 Congressional Record (1964) 14, 15, 16

Davis Bacon Act, 40 U.S.C. §276a(a) 10

Hearings on S.6 and S.917 Before the Housing, Banking and Currency Committee, 88th Cong., 1st Sess. (1963) 12

Hearings on H.R. 3881 Before the Housing, Banking and Currency Committee, 88th Cong., 1st Sess. (1963) 12

Interstate Commerce Act, 49 U.S.C. §11347 (formerly §5(2)(f)) 10, 15

Metropolitan Atlanta Rapid Transit Authority Act of 1965, Ga. Laws 1965, pp. 2243 et seq., *as amended* 2

Norris Laguardia Act, 29 U.S.C. §101, *et seq* 5

Title 12, U.S. Code, Sec. 1749a 9

Urban Mass Transportation Act of 1964, 49 U.S.C. §1601, *et seq* ..... *passim*

U.S. Code Cong. & Ad. News 2577, 2569, 2572, 2584 [1964] 11, 12

No. 81-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE,

Petitioners,

vs.

LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER ON BEHALF OF THE METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY

INTEREST OF AMICUS CURIAE

The Metropolitan Atlanta Rapid Transit Authority ("MARTA" or "Authority") hereby files, pursuant to Supreme Court Rule 36.4, this brief as amicus curiae in support of petitioners, Jackson Transit Authority and the City of Jackson, Tennessee, in the above entitled case.

MARTA is a Georgia public body corporate and a joint instrumentality of the City of Atlanta, Georgia and the Counties of Fulton, DeKalb, Clayton and Gwinnett, Georgia. The Authority's statutory mission is to provide

comprehensive rail and bus rapid transit service within the limits of its member governments, which comprise the core of the Atlanta, Georgia, metropolitan area. Metropolitan Atlanta Rapid Transit Authority Act of 1965, Ga. Laws 1965, pp. 2243 et seq., *as amended.*

In fulfillment of its mission, MARTA operates 13.7 miles of newly constructed rail transit system and a fleet of 842 buses. In its most recently completed fiscal year, the Authority operated 32 million bus miles and 4 million rail miles.

The construction and operation of the Authority's transit system is financed by farebox revenues, the proceeds of a one percent sales and use tax levied in the core member counties, sales tax revenue bonds, and federal grants under Sections 3 and 5 of the Urban Mass Transportation Act of 1964, 49 U.S.C. §§ 1601 *et seq.* ("UMTA").

To establish eligibility for federal capital and operating assistance, the Authority has entered into labor protective arrangements pursuant to Section 13(c) of the UMTA, 49 U.S.C. §1609(c). These arrangements, as approved from time to time by the Secretary of Labor under Section 13(c) have taken the form of "13(c) agreements" between MARTA and the collective bargaining representative of certain of its employees, Local Division 732, Amalgamated Transit Union, AFL-CIO. Local Division 732 is a member of the same national union as respondent in this case.

Since 1973 there has been recurring litigation between MARTA and Local Division 732. In the first such case, *Metropolitan Atlanta Rapid Transit Authority v. Local Div. 732, Amalgamated Transit Union,* No. 14892 (N.D. Ga. July 1, 1973), the court remanded MARTA's petition to enjoin the Local's illegal strike to the state courts on the

grounds that there was no federal jurisdiction over claims arising under either Section 13(c) of UMTA (49 U.S.C. §1609(c)) or a "13(c) agreement." As then U.S. District Judge Albert J. Henderson stated in 1973:

> At issue is the union's alleged failure to honor [the arbitration] portion of the agreement. No argument exists with respect to the remaining provisions of the contract, nor is an interpretation of UMTA or any other federal statute involved. This is simply a suit to enforce the terms of a contract. There is no diversity of citizenship alleged here and the case does not involve a right or immunity guaranteed by the Constitution or laws of the United States so as to create federal question jurisdiction.
>
> *Id.*

Following the decisions in *Local Division 1287, Amalgamated Transit Union v. Kansas City Area Transportation Authority*, 582 F.1d 444 (8th Cir. 1978), *cert. denied* 439 U.S. 1090 (1979); *Local Division 519, Amalgamated Transit Union v. LaCrosse Mun. Transit Utility*, 585 F.2d 1340 (7th Cir. 1978), and *Local Division 714 v. Greater Portland Transit Dist.*, 589 F.2d 1 (1st Cir. 1978), the Northern District of Georgia reversed its previous position and began to entertain federal claims based on alleged breaches of "13(c) agreements."

In the first such case, *Local Div. 732, Amal. Transit Union v. Metropolitan Atlanta Rapid Transit*, No. C80-1601A, (N.D. Ga. Oct. 2, 1980), the Union alleged that MARTA had violated the Labor Agreement by limiting operator work time (regular time plus overtime) to 60 hours per week. The district court assumed jurisdiction, but denied injunctive relief on the grounds that contractual labor arbitration would provide an adequate remedy at law.

Then in April 1981, the Union filed a second action, *Local Div. 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Authority*, No. C81-774 (N.D. Ga.). In this case, the Union sought to set aside or enforce in its favor an award in a grievance arbitration conducted pursuant to the Labor Agreement. The grievance involved whether or not five positions, out of a union represented workforce of 2,200, could be filled on a part time basis. Hon. Orinda D. Evans, the same federal district judge who had heard the prior overtime limitation case, has not yet ruled on the merits of this litigation. However, on June 24, 1981, she entered an order denying, on new grounds, MARTA's motion to dismiss for lack of federal question jurisdiction and for failure to state a claim on the grounds that there is no implied private right of action under Section 13(c) of the UMTA or a "13(c) agreement." Judge Evans held that there is no implied private right of action under Section 13(c) of the UMTA because, under *Cannon v. University of Chicago*, 441 U.S. 677 (1979) and its progeny, MARTA transit labor disputes are matters of special concern to state and local government. Judge Evans retained jurisdiction, however, on the grounds that federal jurisdiction over claims alleging violation of Sec. 13(c) of the UMTA arise under 42 U.S.C. §1983 as construed by this Court in *Maine v. Thiboutot*, 448 U.S. 1 (1980).

Lastly, in *Local Division 732 v. Metropolitan Atlanta Rapid Transit Authority*, 519 F. Supp. 498 (N.D. Ga. 1981), expedited appeal granted July 31, 1981, oral argument heard October 21, 1981 (No. 81-7613, 11th Cir.), the Union obtained from the federal district court a preliminary injunction requiring MARTA to pay following expiration of the former Labor Agreement and pending in-

terest arbitration of a new labor agreement, certain cost of living allowances provided for under the expired Labor Agreement. The district court specifically held that it had federal question jurisdiction and that there is an implied private right of action under both Section 13(c) of the UMTA and 42 U.S.C. §1983. 519 F. Supp. at 502. This case is on appeal to the Eleventh Circuit on the federal jurisdictional and private right of action issues as well as on the question of whether the district court violated the Norris Laguardia Act, 29 U.S.C. §101, *et seq.* by requiring MARTA to continue to pay monies in a labor dispute. Given this background of federal judicial review and intrusion into MARTA's ongoing relationship with Local 732, MARTA has a very substantial and bona fide interest in whether there is federal jurisdiction over private claims alleging violations of 13(c) of the UMTA and "13(c) agreements", and in whether state law or federal law is to be applied to such claims. Because MARTA's labor costs are 75% of its operating costs and because operating costs directly impact the fares which the travelling public must pay and the public monies which are otherwise available to provide transit service, the resolution of transit labor disputes, the law to be applied thereto, and the proper forum for such adjudication, are all of vital and continuing concern to MARTA. In fact, public concern over rising labor costs and fares has been so great that one of MARTA's member governments, on behalf of its citizens, unsuccessfully challenged a recent fare increase in federal district court. See *City of Atlanta v. Metropolitan Atlanta Rapid Transit Authority*, 506 F. Supp. 883 (N.D. Ga. 1980), *affirmed*, 636 F.2d 1084 (5th Cir. 1981).

It is MARTA's position that the Sixth Circuit erred in

deciding that federal subject matter jurisdiction and a private federal right of action exist for an alleged breach of a local collective bargaining agreement or a "13(c) agreement", merely because a public transit agency has accepted financial assistance under the UMTA. Further, the Sixth Circuit erred in recognizing any concept of a federal transit labor law, which, contrary to Congressional intent, could supersede state public employee law. Because these questions are all intertwined, they will be dealt with in a single argument.

SUMMARY OF ARGUMENT

There is no implied right of action under 13(c) of UMTA. The decisions of the Sixth Circuit and the other circuits that have found such a right have been overruled or discredited by the recent decisions of this Court. The language of 13(c) requires only assurances satisfactory to the Secretary of Labor as a condition for federal financial assistance. Supervision by the federal executive through the contract granting federal assistance is and should be the exclusive mechanism for enforcing 13(c) assurances. Private rights of action in other transit labor statutes show Congress did not intentionally omit a private right of action from 13(c). The legislative history affords no support for a private right of action, but instead shows intent to reserve transit labor disputes to state law and the state courts subject only to discretionary enforcement by the Secretary of Transportation of the assurances required by 13(c). Finally, the constitutional policies of *National League of Cities v. Usery*, 426 U.S. 883 (1976) dictate that control of local government labor disputes be left to the states, and that no federal private right of action be implied.

ARGUMENT

There Is No Federal Private Right Of Action Under Section 13(c) Of The Urban Mass Transportation Act Of 1964.

For the Union to invoke the general federal question jurisdiction (28 U.S.C. §§ 1331, 1337), the Union must have for itself or its members an express or implied private right of action to enforce a federal right. *Pennhurst State School v. Halderman*, 67 L.Ed.2d 694 (1981).

In this case, the Sixth Circuit erroneously concluded that a federal private right of action may be inferred from Section 13(c). 650 F.2d at 1383-1387. The Sixth Circuit did so by mechanically applying the "four pronged" test of *Cort v. Ash*, 422 U.S. 66 (1975), by accepting a misplaced analogy to *International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963), and through a faulty reading of the legislative history of the Urban Mass Transportation Act of 1964, 49 U.S.C. Sec. 1601 *et seq.*

The *Cort v. Ash* "four factor test" no longer governs the question of whether a private right of action exists. The first three *Cort* factors are merely a guide to the real question—did Congress contemplate a federal remedy to enforce a federal right? See *Touche Ross & Co. v. Redddington*, 442 U.S. 560, 575-76 (1979). Indeed, if the first two *Cort* factors—plain language and legislative history—indicate that no private right of action was intended by Congress, the federal courts need not even explore the second two *Cort* factors. *California v. Sierra Club*, 68 L.Ed. 2d 101, 110 (1981). The existence of a private right of action is a matter of statutory construction and congressional intent, *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 16-18 (1979). Inquiry must "begin

with the language of the statute itself." *Touche Ross & Co. v. Reddington, supra,* 444 U.S. at 568.

The Urban Mass Transportation Act ("UMTA") of 1964, as amended, 49 U.S.C. §1601 *et seq.* contains no general jurisdictional grant and no provision providing for private rights of action. By its terms, Section 13(c) of UMTA provides only that "fair and equitable arrangements" be made "as determined by the Secretary of Labor," as a condition of assistance to grant recipients under Section 3 of the Act. Most importantly, the contract between the federal government and the grantee must "specify the terms and conditions of the protective arrangements."

Aware that Congress does not intend for the rights and duties imposed by federal statutes to be unenforceable, this Court has been more willing to imply a private right of action if no alternative enforcement mechanism exists. *See, Transamerica Mortgage Advisors, Inc. v. Lewis, supra,* 444 U.S. at 20. If however, an alternate enforcement mechanism exists, the Court feels it "highly improbable that 'Congress absentmindedly forgot to mention an intended private action' ". *Id.*

Here, an alternate mechanism exists for the enforcement of 13(c) rights. The mandated protective arrangements must be in the grant contract between the United States and the recipient of federal financial assistance under the UMTA.

The ability of the United States to enforce the federal grant contract which includes, as it must, the 13(c) protective arrangements, is clear. Section 12(a) of the Urban Mass Transportation Act, 49 U.S.C. §1608(a), gives the Secretary of Transportation, with respect to the entirety

of the Urban Mass Transportation Act, "the functions, powers, and duties set forth in section 1749a of Title 12 . . . ." That section provides in pertinent part—

> . . . the Secretary, notwithstanding the provisions of any other law, may— . . .
>
> (1) prescribe such rules and regulations as may be necessary . . .
>
> (3) *sue and be sued*
>
> (4) foreclose on any property or *commence any action to protect or enforce any right conferred upon him by law, contract, or other agreement* . . . .
>
> (emphasis added) 12 U.S.C. §1749a.

By statute, the Secretary may commence an action to enforce the 13(c) arrangements set forth in the grant contract between the Secretary and a transit grantee, such as Jackson. Read as an entirety, the Urban Mass Transportation Act clearly contemplates enforcement of grant contract conditions by the Secretary, not by private parties.

It would only confuse the issue to claim the Secretary has no duty to enforce 13(c), and hence that the interests of labor may go unvindicated unless a private federal remedy is implied. Had Congress wished to require enforcement of 13(c), it could have done so. Instead, Congress gave the Secretary the power, leaving to his discretion the balance between local transit needs and labor protections, and vesting in him the discretion to terminate grants, commence an action against the grantee to enforce the labor protective arrangements promised by contract to the United States itself, or engage in administrative action designed to encourage compliance. Had Congress contemplated no federal executive role in enforcing 13(c), it would have been totally unnecessary to mandate that "[t]he contract for the granting of such

assistance shall specify the terms and conditions of the protective arrangements." 49 U.S.C. §1609(c). Federal enforcement, in the sound discretion of the Secretary, is the method contemplated by Congress for enforcement of 13(c) obligations. In fact, such flexible and discretionary enforcement comports with the administration's desires and congressional intent at the time the UMTA was enacted. *See*, pp. 13-15 *infra*.

Further, since Congress is well aware of its ability to provide by express statute for a private right of action, the presence of an express private right of action in other parts of a statute or in closely analogous statutes will suggest that no private right of action was intended for the statute in question. *See, Touche Ross & Co. v. Reddington, supra*, 442 U.S. at 572. Congress has evidenced its intent to permit private rights of action in other labor disputes involving federal funds and public transportation.[1]

A limited express right of action is available against a contractor's surety under Section 3 of the Davis Bacon Act. *See Universities Research Ass'n. v. Coutu*, 67 L.Ed.2d 662 (1981). By implication, this same right

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[1] *See, e.g.*, 45 U.S.C. §547(a) (federal courts have jurisdiction over petitions brought by employees in cases involving labor agreements under the Amtrak Act). *See generally, Nat'l. R.R. Passenger Corp. v. Nat'l. Ass'n. of R.R. Passengers*, 414 U.S. 453 (1974). Similarly, under Section 5(2)(f) of the Interstate Commerce Commission Act, the statute expressly referenced in 13(c) itself, federal jurisdiction and a private right of action exist, but only to enforce orders of the ICC, the enforcing federal agency. See *Norfolk & Western R.R. v. Nemitz*, 404 U.S. 37 (1971); *Nemitz v. Norfolk & Western Ry. Co.*, 287 F.Supp. 221 (N.D. Ohio 1968) (28 U.S.C. §1336 (district courts have jurisdiction to enforce ICC orders) and (49 U.S.C. §§9 (private right of action to persons damaged by a common carrier in interstate commerce) and (16(12) (private right of action to a person injured by failure of a common carrier to obey an order of the ICC)).

should be available under Section 13(a) of the Urban Mass Transportation Act which applies Davis Bacon to projects financed under the UMTA. Under *Touche Ross* and *Coutu*, existence of a limited express remedy under 13(a) suggests that implication of a private remedy under 13(c) would be improper.

Second, legislative history is a significant guide to whether Congress intended a private right of action. *See, Coutu, supra; Transamerica Mortgage Advisors, Inc. v. Lewis, supra*, 444 U.S. at 17; *Cannon v. University of Chicago, supra*, 441 U.S. 677, 694.

This Court has stated that the legislative history will usually be silent on whether a private right of action is intended. Read together, *Transamerica, Touche Ross* and *Cannon* suggest a private right of action should be implied only if the legislative history suggests Congress so intended, and that silent legislative history together with a silent statute create a near presumption that no private right of action was intended. However, in this case, the legislative history expressly suggests Congress did not intend a federal private cause of action to enforce federal rights under 13(c).

The purposes of the UMTA as expressed by Congress, *see* 49 U.S.C. §§ 1601, 1601a, 1601b, were to solve the nation's urban transportation problems, not to benefit transit employees. Nowhere does the legislative history of the Act evince a Congressional design to enact the Urban Mass Transportation Act for the especial benefit of transit workers, or to create a private right of action to enforce alleged violations of any labor agreement. Congress explicitly stated that "[i]n the transit industry, . . . the *first objective* is to upgrade facilities and equipment with the best that is at present available." [1964] *U. S.*

Code Cong. & Ad. News 2577 (emphasis supplied). It added that the Act was enacted principally "to assist states and localities in financing the capital facilities and equipment needed for extension and improvement of comprehensively planned urban mass transportation facilities," and to revive and strengthen such facilities "to provide a basic part of local transportation service that will help to reduce street and highway congestion and to form a sound framework for the future transportation needs of our expanding urban economy." [1964] *U. S. Code Cong. & Ad. News* 2569, 2572.

Regarding transit workers, Congress intended only to protect "the rights and privileges which have been already established", [1964] *U. S. Code Cong. & Ad. News* 2584, not to create any new federal rights in favor of such workers.

The primary issue that concerned Congress during its consideration of 13(c), both in Committee and on the floor, was whether the labor provisions of the Urban Mass Transportation Act might, in any way, supersede State law or policy concerning public employee strikes. In debate, the bill's Senate floor sponsor made it clear that 13(c) was not intended to displace or supersede state law governing disputes in the transit industry. 109 *Cong. Rec.* 5421. Before both the Senate Committee, *Hearings on S.6 and S.917 Before the Housing, Banking and Currency Committee*, 88th Cong., 1st Sess. (1963) at 312-13 ("Senate Hearings"), and the House Committee, *Hearings on H.R. 3881 Before the Housing, Banking and Currency Committee*, 88th Cong. 1st Sess. (1963) at 481-82, 486 ("House Hearings"), Secretary of Labor Willard Wirtz stated again and again that 13(c) was not intended to override or supersede state law.

What is plain from the entire legislative history, from first consideration to final enactment, is that Congress intended to give Secretary of Labor Wirtz exactly what he wanted, a flexible tool that would not "override" state law but help the federal government "affect" state law.[2] *Div. 589, Amalgamated Transit Union v. Massachusetts* (1st Cir. 81-1180, -1198, -1219, Sept. 30, 1981), sl. op. at 22.[3]

Following Secretary Wirtz's original assurances in 1963 to the Congress that the administration did not intend 13(c) to supersede state law,[4] the UMTA reached the floor of the Senate. There, Senators Goldwater and Tower sought to add a proviso to 13(c) that labor arrangements must be "consistent with the laws of the State in which the project is located." *Div. 589 v. Massachusetts, supra,* sl. op. at 29. As the First Circuit stated, the amendment was defeated "because, as Senator Williams stated again and again, it was unnecessary: 13(c) did not supersede

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[2] The present regulations of the U.S. Department of Labor setting forth guidelines on approving arrangements pursuant to 13(c) are faithful to Secretary Wirtz's original assurances that 13(c) would not override state law—

> In instances where states or political subdivisions are subject to legal restrictions on bargaining with employee organizations, the Department of Labor will utilize special procedures to satisfy the Federal statute in a manner which does not contravene state or local law.
>
> 29 CFR §215.3(a)(2).

[3] In *Massachusetts*, the First Circuit, following an exhaustive review of the legislative history of 13(c) held that Congress had never intended 13(c) to override or supersede state law.

[4] The First Circuit quoted extensively from Secretary Wirtz's Statements in the House and Senate Hearings (*Div. 589 v. Massachusetts, supra*, sl. op. 21 to 24). The Secretary's position that labor protective arrangements would not supersede state law was reiterated so frequently that the First Circuit did not quote all the examples. Before the House Committee, for example, Congressman Moorhead asked—

state law." [5] *Id.* sl. op. at 30.

Further consideration of the UMTA in 1964, and the finalization of the 13(c) language prior to the enactment of UMTA, in no way negated Congress' continuing intent that 13(c) not supersede state law. Representative Albert Rains, Chairman of the House Subcommittee on Housing, which was responsible for the Urban Mass Transportation Act, offered as an amendment the final version of the 13(c) language. 110 Cong. Rec. 14976. Several Congressmen expressed the same fears that Senators Tower and Goldwater had expressed in the Senate the year before—that the final version of 13(c) would override state law. 110 Cong. Rec. 14979. Congressman Rains, as the bill's sponsor in the house emphasized "that there is not one line in this bill that would vitiate in any way any State or local law in Alabama or Indiana. I want the record to be clear." 110 Cong. Rec. 14980. A few minutes earlier, Congressman Multer had stated:

"I wonder if [the labor protective provision] can be enforced under the State laws of all the 50 States?" Secretary Wirtz responded:

> Yes, Congressman Moorhead. That was a problem to which I just referred in connection with Congressman Widnall's question. That is a difficult area. It is an area in which there are a great variety of administrative practices which have grown up either beside the law or on top of it. It is an area where it is difficult to make generalizations.
>
> *And this proposal is submitted on this basis, that those laws must control, that the State laws must control.*

House Hearings, supra, at 481 (emphasis added).

[5] Again, the First Circuit felt it unnecessary to quote all of Senator Williams' remarks on this point. For example, he also said:

> If the requirement of the amendment that the program be consistent with State law is tantamount to meaning that the program cannot supersede or preempt State law, this is, in my judgment, a dangerous amendment, for one very important reason: It is unnecessary to include it at this point, because it gives the clear implication that it is needed. If the provision is needed, we will find, day after day in this Chamber, that it will have to be

> Nothing in this bill and nothing in any amendment thus far adopted will infringe upon local law, whether it be of a State or municipality.
>
> 110 Cong. Rec. 14980

Relying on these renewed assurances that Congress had not disturbed Secretary Wirtz's original purpose—to provide the federal government with a flexible tool that would not "override" state law but only help the federal government "affect" state law, *Div. 589 v. Massachusetts*, *supra*, sl. op. at 22—the House, and then the Senate,[6] enacted 13(c) and the UMTA into law.

In summary, the First Circuit in *Massachusetts* accurately considered the complete and comprehensive legislative history of 13(c) in determining that Congress never intended to create a federal law of urban transit labor relations that would in any way supersede the state or local interest.

The respondent Union will claim that Congress intended to incorporate *in toto* the history and practice, legislative, administrative, and judicial, under §5(2)(f) of the Interstate Commerce Act into the language of 13(c). The First Circuit rejected this contention. *Massachusetts*, *supra*, sl. op. 33-34. The final report of the House on the final bill belies it—

> put in on the record made on this bill. I believe it is good doctrine that one should never write into legislation what clearly is unnecessary; to do so opens a dangerous precedent for the future. That is simply my position.
>
> 109 Con. Rec. 5421.

[6] Immediately prior to final passage of UMTA in the Senate, Senator Sparkman, who was managing concurrence with the House version in the Senate, 110 Con. Rec. 15447, told the Senate that the Rains' version of 13(c) was the same in purpose and effect as that debated by Senators Tower, Goldwater and Williams the year before. 110 Cong. Rec. 15463.

> . . . railroad employees for years have enjoyed Federal protection against adverse effects attendant upon railroad consolidations. The problems of worker protection presented by the bill are not necessarily identical to those presented by other laws. *House Report* (Banking & Commerce Committee) on H.R. 3881 [*U.S. Code Cong. Rec. & Admin. News.* [1964] 2569, 2584].

Only the urgings of Union General Counsel Cushman and other union representatives, and certain prepared remarks of Senator Wayne Morse, lend any support to total incorporation of 5(2)(f) into 13(c). *See, Senate Hearings* at 327-330; *e.g.*, 110 Cong. Rec. 15459. Secretary Wirtz made it plain that reference to 5(2)(f) would illustrate the desirable level of protections, but not preempt state regulation of local government transit labor relations. *Senate Hearings, supra*, at 313, 320.

Plainly, Congress intended that labor-management disputes in the transit industry were to be reserved to State law. While this Court in *Transamerica* and *Touche Ross* has coalesced the first three factors of the *Cort v. Ash* test into a legislative intent inquiry, *Touche Ross v. Redddington, supra*, 442 U.S. at 568, the fourth test remains viable —implying a federal remedy is inappropriate if the subject matter remains basically of concern to the States. See *Cannon v. University of Chicago, supra*, 441 U.S. at 708. If Congress intended that state and local law would govern transit labor disputes, surely Congress cannot have intended a private right of action under 13(c).

In *National League of Cities v. Usery*, 426 U.S. 883 (1976), this Court held that local governmental labor relations are constitutionally matters of local law, and that there is a unique and traditional state law interest in such matters.

Plainly, by both Congressional intent and Supreme Court decision, 13(c) is an area, local government labor relations, where "the subject involves an area basically of concern to the States," *Cannon v. University of Chicago, supra,* 441 U.S. at 708. Hence, no federal right of action should be implied here.

Finally, by paying too much attention to whether Congress intended to benefit transit workers under the *Cort v. Ash* tests, and not enough attention to whether Congress really intended to create a private remedy, the Sixth Circuit placed too much emphasis on this Court's 1963 decision in *Int'l. Ass'n. of Machinists v. Central Airlines, supra.*[7]

In *Machinists,* this Court held only that there was federal jurisdiction and a private right of action to enforce the arbitral award of an airline labor adjustment board. The existence and jurisdiction of the labor board were mandated by federal statute although the details were left to the labor contracts of the airlines and unions. Failure to enforce an award of the Board could have made the existence of the boards themselves an exercise in futility, and hence frustrated the entire statutory scheme. Further, the airline industry was in interstate commerce, and an overriding national interest in its labor matters was clearly present.

None of those key elements are present here. Lack of a federal private right of action in no way nullifies enforcement by the United States or renders 13(c) a nullity.

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[7] A majority of this Court has already noted that *Machinists* deviates from the established pattern of this Court's implied private right of action cases, and that the result "can best be explained historically. . . ." *See, Cannon v. University of Chicago, supra,* 441 U.S. 690, fn. 13.

Further, there is no overriding national interest in the transit labor relations of individual local political subdivisions providing transit service, not in interstate commerce, within individual metropolitan areas.

CONCLUSION

For the foregoing reasons, MARTA respectfully requests that the judgment of the United States Court of Appeals for the Sixth Circuit be vacated, and that this case be remanded with the direction that Respondent's complaint be dismissed for failure to state a claim on which relief can be granted.

Respectfully submitted, Jan 14, 1992

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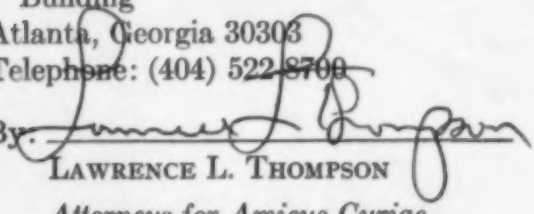
By: 
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THE CITY OF JACKSON, TENNESSEE,

Petitioners,

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LOCAL 1285, AMALGAMATED TRANSIT UNION,
AFL-CIO-CLC

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE, AND BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE

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January 1982

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-411

JACKSON TRANSIT AUTHORITY AND
THE CITY OF JACKSON, TENNESSEE,

Petitioners,

v.

LOCAL 1285, AMALGAMATED TRANSIT UNION,
AFL-CIO-CLC

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Institute of Municipal Law Officers (NIMLO) moves the Court for leave to file the attached brief as amicus curiae in support of the Petitioners, Jackson Transit Authority and the City of Jackson, Tennessee. The Petitioners have consented to the filing of the brief. Respondent's consent was requested. No response has been received. The letter granting consent has been lodged with the Clerk of this Court.

NIMLO submits that its brief can assist the Court in determining whether Section 13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 1609(c), creates a private federal remedy for alleged breaches of collective bargaining agreements between public transit authorities and transit employees. NIMLO's interest in the issue presented in this case is set out in the Interest of the Amicus Curiae section of the attached brief. That brief analyzes the historical development of transit operations in the United States from the days of private ownership and operation to the present situation of forced takeover and operation by state and local governments. It also considers the lack of any indication in the Act or its legislative history that Section 13(c) was intended to create a national labor policy that would displace the ability of state and local governments to structure employment relationships with transit employees in providing this essential public service.

Because of the widespread ownership and operation of transit systems by state and local governments, this case is of nationwide importance and, we submit, the attached amicus brief will assist the Court in evaluating the nationwide impact that the decision below will have if left standing.

Therefore, we urge the Court to grant NIMLO leave to file the attached brief as amicus curiae.

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TABLE OF CONTENTS

Page

Interest of the amicus curiae 1

Statement of the case 3

Summary of argument 5

Argument 6

I. Public transportation operations have become the function and responsibility of local governments 7

A. Government ownership and operation of transit systems is the result of the historical development of transit operations in the United States 7

B. With heavy government subsidization, public transit has become an integral component of the local government planning process for the attainment of social, economic and environmental goals 11

II. Congress did not intend, in enacting Section 13(c) of the Urban Mass Transportation Act of 1964, to create a national public transportation labor law, enforceable in federal courts, which would significantly alter or displace the ability of local governments to structure public transportation labor relations 12

Conclusion 15

TABLE OF AUTHORITIES

Page

Cases:

Alewine v. City Council of Augusta, Ga., 505 F.Supp. 880 (S.D.Ga.) 9

American Public Transit Association v. Lewis, 655 F.2d 1272 (D.C. Cir.) 11

Local Division 589, ATU v. Commonwealth of Massachusetts, Nos. 81-1180 and 81-1219 (1st Cir. Sept. 30, 1981) 13

Munn v. Illinois, 94 U.S. 113 7

National League of Cities v. Usery, 426 U.S. 833 2,12

Constitution, statutes and regulations:

Clean Air Act, 42 U.S.C. §7401 *et seq.* 8

42 U.S.C. §7506(c) 11

National Labor Relations Act, 29 U.S.C. §152(2) ..5,12,13

Rehabilitation Act of 1973, 29 U.S.C. §794 11

Urban Mass Transportation Act of 1964, 49 U.S.C. §1601 *et seq.*

49 U.S.C. §1602 9

49 U.S.C. §1604(m) 11

49 U.S.C. §1609(c) ..... *passim*

49 U.S.C. §1612 8

28 U.S.C. §1331(a) 5

Miscellaneous:

American Public Transit Association, Transit Fact Book (1978-1979 ed.) 8

109 Congressional Record 5674 (1963) 13

46 Federal Register 37488 (July 20, 1981) 11

Hearings on S.6 before the Senate Committee on Banking and Currency, 88th Cong., 1st Sess., at 312 (1963) 13

H.R. Rep. No. 88-204, 88th Cong., 2d Sess. (1963)..... 13

The Impact of Transportation on the Central Business District, Traffic Quarterly, October 1980 11

Institute of Public Administration, Financing Transit: Alternatives for Local Government, July 1979..... 8,9

University of Illinois at Chicago Circle, School of Urban Sciences, Moving People: An Introduction to Public Transportation, January 1981 8,9,10

Womack and Altschuler, An Examination of the Transit Funding Process at the Local Level, May 1979.....10

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BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed on behalf of the more than 1600 local governments, or political subdivisions of states, who are members of the National Institute of Municipal Law Officers (NIMLO). These member local governments operate NIMLO through their chief legal officer, variously called city or county attorney, corporation counsel, city solicitor or law director and other titles, with each member

local government having one vote on all actions which are cast by the organization. This brief *amicus curiae* is signed by the chief legal officers of NIMLO members on behalf of their own local government and the chief legal officers of the members of NIMLO in their official capacity.

In those cities and counties which own and operate transit systems, local government attorneys who participate in NIMLO advise local government officials on transit system employer-employee relations; they assist in negotiating contracts between municipal transit systems and their employees, both through collective bargaining, and through arbitration processes, where they exist; and they advise local governing bodies when transit employees threaten to or take strike actions. The City of Jackson, Tennessee is a member of NIMLO.

Since the commencement of public transportation service, local governments have structured their relationships with transit employees free from federal interference. The nature of public transit service has made public transit operations an integral and, by now, traditional governmental function within the meaning of our Nation's system of Federalism as expressed in this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Recently, however, the freedom of local governments to structure such labor relations has been limited, if not displaced, by the assumption of jurisdiction by lower federal courts over actions brought by municipal transit employees under the provisions of Section 13(c) of the Urban Mass Transportation Act of 1964 (UMTA), 49 U.S.C. §1609(c).

Disputes between local governments and public transit employees have long been settled without federal supervision. The recent assumption of jurisdiction by the lower federal courts of actions brought by transit unions under so-

called Section 13(c) Agreements has now opened the entire sphere of public transit labor relations to the scrutiny and regulation of the federal courts. The prospect of review of basic local government transit labor decisions, through application of a judicially fashioned "*national* labor policy," discovered by some lower federal courts in the language of UMTA, has created substantial uncertainty among cities concerning local transit labor relations.

Because of the substantial interference in traditional and integral local government functions, which continuing federal judicial scrutiny of local transit labor decisions would entail, the National Institute of Municipal Law Officers suggests that an assumption of federal jurisdiction, to entertain all suits brought under the provisions of Section 13(c) of UMTA, is both unwarranted and undesirable. Consequently, NIMLO urges reversal of the judgment rendered in this case by the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

Jackson, Tennessee is a municipality located in mid-western Tennessee. Until April, 1966, transit service in Jackson was provided by Jackson City Transit Lines, Inc., a private bus company. Faced with the prospect of losing this essential public service, the city was forced to assume ownership and operation of the service previously provided by the private transit company. Pet. App. 28a-29a.

In 1966, pursuant to state statute, Jackson created a transit authority which applied for a capital grant under the Urban Mass Transportation Act, for assistance in purchasing the private bus line, and in obtaining new buses and a

new bus maintenance facility. As a condition of federal funding, Jackson entered into a Section 13(c) Agreement which was certified by the Secretary of Labor as a "fair and equitable arrangement" for protection of Jackson's employees.[1] Pursuant to a grant contract between Jackson and the United States, Jackson was given a capital grant of $279,000.

On April 1, 1975, a collective bargaining agreement was executed by Local 1285 of the Amalgamated Transit Union, which represents Jackson's transit workers, and the individual who managed the Jackson transit system.[2] Jackson itself was not a party to the agreement. Almost immediately after execution of the agreement, Jackson's transit system manager resigned. Because that agreement had not been approved by Jackson's Board of Commissioners, in accordance with local law, Jackson notified Local 1285 that it would not be bound by the agreement. Following unsuccessful efforts by Local 1285 to obtain administrative relief from the Secretary of Labor, this action was commenced.

In the District Court, the petitioner filed a motion to dismiss the Union's complaint for want of federal jurisdiction. The motion was granted, because the Union "failed to demonstrate that federal jurisdiction exists in this case." Pet. App. 30a. Reversing the District Court's decision, the United States Court of Appeals for the Sixth Circuit found

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[1]In fact, the District Court found that the employees of the private company received a benefit, in the form of continued employment, as a result of public takeover. Pet. App. 28a-29a.

[2]This agreement was preceded by three other collective bargaining agreements, each of three years duration. Subsequent to the receipt of the initial grant from UMTA in 1966 and prior to the commencement of this suit some nine years later, Jackson had not received any federal funds for operation of the transit system. Pet. 4.

that "Section 13(c) reflects *national* labor policy," Pet. App. 12a, from which it was proper to imply a private federal remedy for any breach of a collective bargaining agreement by public transit authorities. Adopting the Union's contention that its action against Jackson, to enforce a supposedly "existing" collective bargaining agreement, "arose" under Section 13(c) of UMTA, the Court of Appeals held that the District Court was invested with jurisdiction of the Union's complaint under 28 U.S.C. §1331(a). Pet. App. 6a. Under the Court's rationale, the "*national* labor policy", whose expression was found in Section 13(c), justifies assumption of jurisdiction by the lower federal courts over all actions to enforce local transit collective bargaining agreements, or to remedy their supposed breach.

SUMMARY OF ARGUMENT

Historically, cities have granted franchises to private transit systems to occupy the public streets, and have regulated the rates charged the public for use of the private service. More recently, when faced with the termination of private transit service, cities have been forced by circumstances to purchase and operate formerly private transit systems as public functions.

Public employees are exempt from regulation by federal labor law. National Labor Relations Act, 29 U.S.C. §152(2). Nothing in the language of §13(c) of the Urban Mass Transportation Act of 1964 (UMTA), 49 U.S.C. §1609(c), or in its legislative history, suggests that Congress intended to repeal, either directly or by implication, the general exemption of local government employees from federal labor relations regulations. Section 13(c) of the

UMTA did not enact a "*national* labor policy" concerning public transit service employees, from which federal courts might imply and fashion federal common law to decide local transit labor-management contractual disputes. No federal cause of action should be implied to permit local transit employees to remedy in federal court every alleged grievance arising from local transit labor relations.

ARGUMENT

The Court of Appeals' finding that Section 13(c) of the Urban Mass Transportation Act of 1964, (UMTA), 49 U.S.C. § 1609(c), confers a private federal right of action on transit employees for alleged breaches of collective bargaining agreements was based on the absence in the Act's legislative history of any discussion of the means of enforcing Section 13(c) Agreements. Pet. App. 10a. The effect of the decision below will be to transfer to the federal courts responsibility for cases which turn on the principles of state contract law.[3] Nothing prevents these actions from being brought in the state courts where they have traditionally been brought and decided. The Court's decision ignores the reality of public transit operations today and the consequences for our Nation's system of Federalism that such a result will have.

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[3]The petitioner has collected numerous cases involving collective bargaining agreements between public transit authorities and local unions which have already been filed in the District Courts as a result of the decision below and of the other federal appellate courts. Pet. 23.

I. PUBLIC TRANSPORTATION OPERATIONS HAVE BECOME THE FUNCTION AND RESPONSIBILITY OF LOCAL GOVERNMENTS

Local governments have long been involved in the provision of transit services to the public, historically as grantors of franchises to private transit companies to occupy the public streets and as regulators of the rates charged the public for use of the service.[4] More recently, local governments have been forced to assume the role of owner and operator of mass transit systems as financially troubled private companies have ceased to do business. The rise in public ownership and operation of transit systems is largely due to the availability of federal funding for the purchase of financially ailing private systems.

A. GOVERNMENT OWNERSHIP AND OPERATION OF TRANSIT SYSTEMS IS THE RESULT OF THE HISTORICAL DEVELOPMENT OF TRANSIT OPERATIONS IN THE UNITED STATES

This dramatic and relatively recent forced rise in public ownership and operation of transit systems grew out of an overall decline in the use and revenues of the private transit industry following World War II. Both a general shift of

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[4] *Munn* v. *Illinois*, 94 U.S. 113, 125 (1876) "[In the exercise of the police power] it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen . . . and in so doing to fix a maximum charge to be made for services rendered. . . ."

population from urban to suburban areas,[5] and increased dependence upon private automobiles for transportation, contributed to a dramatic decrease in transit system ridership.[6] Increased "social" costs, incurred in providing specialized services and in achieving desired environmental and social goals,[7] inflation and increased labor costs,[8] combined with the decline in fare revenues to create ever increasing operating deficits.[9]

The options available to privately owned and operated transit systems experiencing financial difficulties were few:

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[5]Given the lower density in suburban areas, the cost of transit service per passenger greatly increased. Another phenomenon known as "peaking," or the concentration of riders during the rush hours, in combination with labor contracts requiring overtime for hours worked in excess of eight, actually makes rush hour service more costly than non-rush hour services. University of Illinois at Chicago Circle, School of Urban Sciences, *Moving People: An Introduction to Public Transportation*, January 1981, at 15, 16, 18, hereafter referred to as *Moving People.*

[6]In 1950, transit carried 13.8 billion passengers. By 1977, ridership had decreased to 5.7 billion. *Moving People, supra*, at 5.

[7]Including, for example, compliance with the Clean Air Act, 42 U.S.C. §7401 *et seq.*, see discussion at note 18, *infra*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and the Urban Mass Transportation Act of 1964, 49 U.S.C. §§1609, 1612, see discussion at note 19, *infra*.

[8]A substantial proportion (75%) of operating expenses are attributable to wages and related benefits. In 1950, the average annual transit wage was higher than the wages of manufacturing and city employees. Between 1950 and 1975 the rate of increase in transit wages was more than 50% greater than that for manufacturing employees. Institute of Public Administration, *Financing Transit: Alternatives for Local Government,* July 1979, at 8-9, hereafter referred to as *Financing Transit.*

[9]In the mid 1960s, operating costs were approximately equal to operating revenues. By 1974, operating expenses were more than one and one-half times greater than operating revenues. Small wonder that private operators quit this field of service! American Public Transit Association, *Transit Fact Book,* (1978-79 ed.), at 20-21.

raise fares, cut services and forego capital expenditures. When these measures failed to rescue the private system, the only alternative to loss of the service was for the local government to purchase and operate the system. Largely because financial support, in the form of federal funds, became available to public bodies for acquiring transit systems from private owners,[10] local governments began taking over private transit systems.[11] At present, at least 463 municipal transit systems are publicly owned. Those systems now account for 90% of the nation's transit system operating revenues, and 91% of all transit system ridership. *Alewine* v. *City Council of Augusta, Ga.*, 505 F.Supp. 880, 886 (S.D. Ga. 1981).

Since public takeover of private transit systems, those systems have ceased to operate as they did when privately owned. Increased costs are not always passed on to the consumers. Nor are fares necessarily tied to per passenger transit costs.[12] On the contrary, continually declining

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[10]With enactment of the Urban Mass Transportation Act of 1964 (UMTA), 49 U.S.C. § 1601 *et seq.*, the federal government made federal funds for acquisition of private systems available. 49 U.S.C. § 1602. Since the enactment of UMTA, the federal government has been heavily involved in the subsidization of public transit systems, providing 80% of the total financial assistance for capital expenditures and 10.9% of all operating assistance. *Moving People, supra,* at 70.

[11]This pattern of forced public takeover of a financially ailing private transit system was followed in Jackson. Faced with the loss of transit services provided by the private transit company, the city created the Jackson Transit Authority which applied for and was granted a $279,000 capital grant under UMTA to purchase new buses and a new maintenance facility. Pet. 14.

[12]Between 1950 and 1970, fares rose slightly less than transit costs per passenger. However, between 1970 and 1975, transit costs per passenger rose 14.3% per year while fares rose only 3.6% per year. *Financing Transit, supra,* at 8, 10.

amounts of operating expenses are recovered from fares.[13] Rather, publicly owned transit systems are supported by general tax revenues obtained from transit and non-transit riders alike, all of whom benefit directly and indirectly from public transit service.[14]

The expectation that public takeover and operation would cure the transit systems' financial woes has not materialized.[15] As public takeover occurred, public attitudes toward the financing of transit changed. There is a great reluctance to raise fares in cities experiencing public takeovers, accompanied by pressures to provide special services and higher wages to avoid transit strikes.[16]

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[13]At present, approximately 55% of operating expenses are recovered from fares. Local and regional authorities provide 22% of all operating assistance. State subsidies account for 9.45%. *Moving People, supra,* at 20.

[14]State and local tax revenues from income, property, sales, motor vehicle fuel, utility and excise taxes pay more than 50% of public transit's operating deficit. The federal government contributes about 10.9% of all operating revenues, accounting for some $2 billion in subsidies in 1978.*Id.*

[15]The following was observed in a case study of cities experiencing public takeovers.

> "In our case study cities we found a widespread expectation that public ownership and subsidization would stabilize transit finances by reducing operating costs (through new capital) and by helping to attract new riders. However, more nearly the opposite has occurred: unit costs (per vehicle mile and per passenger) have increased rapidly in constant dollars during the period of public, subsidized operation. Consequently, the amount of public support needed to continue systems operations at a given level has continued to grow rapidly. . . ." Womack and Altschuler, An Examination of the Transit Funding Process at the Local Level, May 1979, Executive Summary, at 4.

[16]*Id.*, at 18.

B. WITH HEAVY GOVERNMENT SUBSIDIZATION, PUBLIC TRANSIT HAS BECOME AN INTEGRAL COMPONENT OF THE LOCAL GOVERNMENT PLANNING PROCESS FOR THE ATTAINMENT OF SOCIAL, ECONOMIC AND ENVIRONMENTAL GOALS

As a result of public takeover and operation of transit services, transit has become an essential means of achieving governmental goals that benefit not just the transit passenger but, ultimately, society as a whole. Transportation planning figures prominently in the local comprehensive land use planning process[17] and in the governmental planning process designed to achieve cleaner air.[18] Furthermore, among the conditions to the receipt of federal funding are the requirements that special services be provided to special segments of society, such as the elderly and the handicapped.[19] It is doubtful that these governmental goals would be attainable if public takeover had not occurred.

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[17]The availability of public transportation allows land in the central business district to be used at its highest potential, for commercial office space, thus reducing its use for traffic and parking needs. The Impact of Transportation on the Central Business District, *Traffic Quarterly*, October 1980, at 523.

[18]Activities approved, supported or funded by the Department of Transportation must conform to the State Implementation Plan required under the Clean Air Act. 42 U.S.C. §7506(c).

[19]Rates for the elderly and the handicapped during non-peak hours may not exceed one-half of the rates generally applicable during peak hours. 49 U.S.C. §1604(m). The Department of Transportation (DOT) has issued an interim rule requiring recipients of federal funds to certify that "special efforts" to provide transportation that handicapped persons can use are being made. 46 Fed. Reg. 37488 (July 2, 1981). The rule is the result of the decision in *American Public Transit Association v. Lewis*, 665 F.2d 1272 (D.C. Cir. 1981) holding that regulations implementing §504 of the Rehabilitation Act of 1973 exceeded DOT's authority under that statute.

II. CONGRESS DID NOT INTEND, IN ENACTING SECTION 13(c) OF THE URBAN MASS TRANSPORTATION ACT OF 1964, TO CREATE A NATIONAL PUBLIC TRANSPORTATION LABOR LAW, ENFORCEABLE IN FEDERAL COURTS, WHICH WOULD SIGNIFICANTLY ALTER OR DISPLACE THE ABILITY OF LOCAL GOVERNMENTS TO STRUCTURE PUBLIC TRANSPORTATION LABOR RELATIONS

The success or failure of municipalities in discharging their obligation to provide integral public transit services depends in large part upon their ability to make fundamental employment decisions concerning wages, hours, overtime pay, vacation schedules, and the like, through local collective bargaining free from federal interference. Constant federal judicial scrutiny of such basic local governmental decisions would "significantly alter or displace the States' abilities [through their municipalities] to structure employer-employee relationships [in the transit labor area]." *National League of Cities* v. *Usery, supra,* at 851.

Recognizing the importance of local government decisionmaking to the successful provision of traditional government functions, the Congress wisely chose to exempt all municipal labor relations from such federal scrutiny and interference in the National Labor Relations Act (NLRA), 29 U.S.C. §152(2). That Act, which governs almost all private labor-management relations, excludes from its coverage the employees of "any state or political subdivision thereof." *Id.* No municipal employee may invoke federal jurisdiction to obtain judicial scrutiny of local collective bargaining arrangements or of their alleged breach. By enacting Section 13(c) of UMTA, the Congress did not

intend to alter that general rule, or to create any "*national* labor policy" concerning the relationship between municipalities and their transit employees.[20]

The legislative history of Section 13(c) of UMTA suggests that the Congress fully intended to leave undisturbed the ability of local governments freely to structure their labor relations with transit employees. Repeatedly during Congressional debates and hearings on UMTA, the proponents of the Act announced that "there could be no superseding of the State laws by a provision [like Section 13(c)];"[21] that Section 13(c) was drafted in its present form "in order to make clear that Taft-Hartley exemptions [from the NLRA] are not changed" by the Act;[22] and that Section 13(c) "deals with municipal and State problems, not Federal problems."[23]

Nowhere did Congress evince any intention to abrogate the otherwise plenary authority of municipalities to fashion their public employee labor relations by creating a federal common law of transit labor relations whose contours can be discerned and defined only by federal judicial incantation. Instead, the Congress expressed its desire to leave "specific conditions for worker protection" to "the product of local bargaining and negotiation,"[24] and not to the federal courts.

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[20]*Local Div. 589, ATU* v. *Massachusetts,* Nos. 81-1180, and 81-1219, (1st Cir., Sept. 30, 1981), Slip op. at 34-35, 37-40, *aff'g* 511 F.Supp. 312 (D. Mass. 1981).

[21]*See e.g.* Hearings on S.6 before the Senate Committee on Banking and Currency, 88th Cong., 1st Sess., at 312 (1963) (remarks of then Secretary of Labor Wirtz).

[22]*See e.g.* 109 Cong. Rec. 5674 (1963) (remarks of Senator Morse).

[23]*Id.*

[24]H.R. Rep. No. 88-204, 88th Cong., 2d Sess., reprinted in [1964] U.S. Code Cong. & Ad. News, 2584-85.

Absent any clear expression of Congressional intent to repeal the exemption of municipal transit workers from the coverage of federal labor law, or any expression of its desire to alter or displace the ability of municipalities to structure their transit labor relations free from federal interference, NIMLO submits that the federal courts should decline to intervene in local public transit labor disputes by assuming jurisdiction of actions which allege violations of Section 13(c) of UMTA. Similarly, NIMLO suggests, the federal courts should not imply from Congressional silence that, simply by supplying funds for local transit operating and capital expenditures, the Congress intended federal courts to fashion a judicial remedy for every alleged grievance which may arise from local transit labor disputes.

The holding of the Court of Appeals in this case, that Section 13(c) of UMTA created a "*national* labor policy", is simply wrong. That holding makes more likely the persistence of transit contract disputes between public employers and their transit employees, who may seek refuge from unfavorable local decisions in the federal courts. The decision of the Court of Appeals in this case, NIMLO submits, should be reversed.

CONCLUSION

For the foregoing reasons, the National Institute of Municipal Law Officers, as *amicus curiae,* respectfully submits that the decision rendered by the United States Court of Appeals for the Sixth Circuit in this case should be reversed.

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On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF PUBLIC SERVICE RESEARCH COUNCIL AND BRIEF OF PUBLIC SERVICE RESEARCH COUNCIL AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-411

JACKSON TRANSIT AUTHORITY AND
THE CITY OF JACKSON, TENNESSEE,

Petitioners,

v.

LOCAL DIVISION 1285, AMALGAMATED
TRANSIT UNION, AFL-CIO-CLC,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF PUBLIC SERVICE RESEARCH COUNCIL

The Public Service Research Council respectfully moves for leave to file the annexed brief *amicus curiae*.* In support of this motion, the Council states:

Public Service Research Council is an independent national citizens' organization engaged in nonpartisan research and

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* Pursuant to Rule 36 of the Rules of this Court, Public Service Research Council requested consent of the parties to the filing of a brief *amicus curiae* in this case. Counsel for Petitioners has taken no position regarding the filing of this brief, while Counsel for Respondent has refused to consent to the filing of said brief, necessitating this motion. Counsel for Petitioner's letter will be sent directly to the Court. Counsel for Respondent's letter has been filed with the Clerk of the Court.

education concerning public service unionism and its effects upon the nation's governmental institutions and their services to all Americans. It is a voluntary association of private citizens, legislators, scholars, and commentators united by a common concern with the maintenance of limited, constitutional government. With over 900,000 members, the Council is the nation's largest citizens' organization concerned exclusively with curbing the abuses of public sector unions in the United States. Public Service Research Council's request for leave of the Court to file the annexed brief as *amicus curiae* is in furtherance of its continual effort to achieve its stated goals.

Because of the Council's above stated fundamental concerns, it has been active as a friend of the court at all levels of the legal process to affect evolving concepts of law in connection with various matters in the public interest and has filed briefs *amicus curiae* in *National League of Cities, et al.* v. *Hon. Peter J. Brennan* and *State of California* v. *Hon. Peter J. Brennan*, Supreme Court of the United States, Nos. 74-878 and 74-879; *City of Madison Joint School District No. 8, et al.* v. *Wisconsin Employment Relations Commission, et al.*, Supreme Court of the United States, No. 75-946; *Commonwealth of Virginia* v. *The Board of Supervisors of Arlington County, et al.*, and *Commonwealth of Virginia* v. *The County School Board of Arlington County, et al.*, Supreme Court of Appeals for the Commonwealth of Virginia, Nos. 18747 and 18748, 1976; and *Pacific Legal Foundation and Public Employees Service Association* v. *Edmund G. Brown, Jr., Public Employees Relations Board, and Kenneth Cory* and *People of the State of California* v. *Edmund G. Brown, Jr., State Personnel Board, and Kenneth Cory*, Court of Appeal of the State of California for the Third Appellate District, 3 Civil No. 18364 and 3 Civil No. 18412, 1979. Most recently, the Council filed briefs *amicus curiae* in *United States of America* v. *Professional Air Traffic Controllers Organization, et al.*, United States District Court for the District of Columbia, Civil Action No. 81-1805, *United States*

of America v. *Professional Air Traffic Controllers Organization, et al.*, United States District Court for the Eastern District of Virginia, Civil Action No. 81-0763A; *Air Transport Association of America, et al.* v. *Professional Air Traffic Controllers Organization, et al.*, United States District Court for the Eastern District of New York, No. 70-C-400. Further the Council has recently been permitted to file a brief *amicus curiae* in this Court in *Professional Air Traffic Controllers Organization, et al.* v. *United States of America*, No. 81-542.

Movant believes that the positions it is advancing, particularly the arguments relating to the principles of the separation of powers and federalism, will not be fully argued to the Court by the parties in the instant case. The underlying issues of the case being of vital public interest and Public Service Research Council being interested in providing additional assistance and views to this Court as *amicus curiae*, movant respectfully requests that its motion for leave to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The City Of Jackson Did Not Violate § 13(c) Of The Urban Mass Transportation Act, The Union Did Not Suffer An Injury Under The 1966 Federal Grant To The City, And In The Absence Of Both A Violation And An Injury There Is No Cause Of Action	4
II. By Creating An Implied Right Of Action In The Absence Of An Expressed Intention By Congress To Confer Such Jurisdiction, A Federal Court Usurps The Authority Of Congress And Violates The Separation Of Powers	8
III. Congress Did Not Intend That The Urban Mass Transportation Act Of 1964 Provide A Federal Private Right Of Action	14
A. *The Express Purpose Of The Urban Mass Transportation Act Of 1964 Is To Provide Financial Assistance, Not Exercise Regulatory Authority*	14
B. *The Legislative History Of The Urban Mass Transportation Act Of 1964 Exhibits No Congressional Intent To Create A Federal Private Right Of Action*	17
IV. The Creation Of An Implied Right Of Action For An Alleged Breach Of A Collective Bargaining Agreement Between Public Transit Employees And Jackson Violates The Tenth Amendment To The Constitution	20
CONCLUSION	23

TABLE OF AUTHORITIES

Page

California v. *Sierra Club*, ____, U.S. ____, 101 S. Ct. 1775 (1981) 16, 19

Cannon v. *University of Chicago*, 441 U.S. 677 (1979) .. *passim*

Cort v. *Ash*, 422 U.S. 66 (1975) ..... *passim*

Florida Lime & Avocado Growers v. *Paul*, 373 U.S. 132 (1963) 22

Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC v. *Jackson Transit Authority*, 650 F.2d 1379 (6th Cir. 1981) ..... *passim*

Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC v. *Jackson Transit Authority*, 447 F. Supp. 88 (W. D. Tenn. 1977) 19

National League of Cities v. *Usery*, 426 U.S. 833 (1976) *passim*

Schooner Paulina's Cargo v. *United States*, 7 Cranch 52 (1813) 13

Texas and Pacific R. Co. v. *Rigsby*, 241 U.S. 33 (1916) .. 9

Touche Ross v. *Redington*, 422 U.S. 560 (1979) 11

Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 (1979) 11, 13

United States v. *Fisher*, 2 Cranch 358 (1805) 12

Universities Research Ass'n. v. *Coutu*, ____ U.S. ____, 101 S. Ct. 1451 (1981) 11

STATUTES:

Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* (1982) 20

Federal Highway Aid Act of 1973, Pub. L. No. 93-87, §164, 87 Stat. 250 16

Mental Health Systems Act, § 801, 42 U.S.C. § 9521 (1982) 16

National Labor Relations Act, 29 U.S.C. §151 *et seq.* (1982) 5

National Mass Transportation Assistance Act of 1974, §103, 49 U.S.C. §1602 (1982) 16

Railroad Revitalization and Regulatory Act of 1976, §516, 45 U.S.C. §836 (1982) 16

TABLE OF AUTHORITIES

Page

Rivers and Harbors Appropriation Act of 1899, § 10, 33 U.S.C. § 403 (1982) 19

Urban Mass Transportation Act of 1964, 49 U.S.C. §1601 *et seq.* (1982) ..... *passim*

Urban Mass Transportation Act of 1964, §13(c), 49 U.S.C. §1609(c) (1982) ..... *passim*

5 U.S.C. § 7123 16

42 U.S.C. §1601(a) 14

42 U.S.C. §1601(a)(3) 14

42 U.S.C. §1601(b) 14

42 U.S.C. §1606 16

42 U.S.C. §1609(a) 16

42 U.S.C. §1610 16

42 U.S.C. §1983 16

42 U.S.C. § 2000c-8 16

OTHER:

U.S. Const. art. 1, § 8, cl. 1 21

U.S. Const. art. III 22

U.S. Const. amend. X ..... *passim*

S. Rep. No. 82, 88th Cong., 1st Sess. (1963) 6, 8, 23

109 Cong. Rec. 5674 (1963) 18

S. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 Wm. & Mary L. Rev. 814 (1981) 10

T. Cooley, Treatise on Constitutional Limitations (1871) .. 12

T. Sedgwick, Treatise on . . . the Interpretation and Construction of Statutory and Constitutional Law (1874) 11, 12, 13

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BRIEF OF PUBLIC SERVICE RESEARCH COUNCIL AS AMICUS CURIAE

This brief *amicus curiae* on behalf of the Public Research Council is filed contingent upon the Court's granting the foregoing motion for leave to file a brief *amicus curiae*.

INTEREST OF THE AMICUS CURIAE

The interest of the Public Service Research Council is set forth in its foregoing motion for leave to file a brief as *amicus curiae*.

SUMMARY OF ARGUMENT

The central question before this Court is whether Congress, in enacting the Urban Mass Transportation Act of 1964 (UMTA

or the Act), 49 U.S.C. § 1601 *et seq.*, created a federal private right of action for employees of a municipally owned transit system for an alleged breach of a local collective bargaining agreement.

Before resolution of this issue, however, it is necessary to establish that a cause of action exists on the facts of this case. Although there is no precise definition, a cause of action generally requires that the party asserting the right be injured by another's violation of a legal obligation. In this case these requirements are not met. Section 13(c) of UMTA simply sets forth preconditions to the granting of federal assistance. Once a municipality has met these conditions and a grant has been made, its duty under Section 13(c) has come to an end. The City of Jackson met the preconditions of Section 13(c) and received a grant. The union has obviously not been injured by this grant. The city's duty under Section 13(c) having been met, and the union having suffered no injury, there can be no cause of action based on Section 13(c).

Moreover, creation of an implied federal private right of action would violate the separation of powers doctrine. There is no dispute in this case that UMTA does not provide an express federal private right of action. If such a right exists at all, it must be implied. *Cort* v. *Ash*, 422 U.S. 66 (1975), and its progeny permit federal courts to consider factors other than the intent of Congress in determining whether such a right of action exists. This rule invites federal courts to rewrite statutes according to their wishes. Indeed, it enables them to find implied rights of action where Congress has expressed no intent at all to do so. In this case the Circuit Court itself acknowledged that Congress had not expressed itself on the creation of a private right of action under UMTA, but found one nonetheless. Yet, if Congress, and not the federal courts, is to write the laws, the courts should consider only the intent of Congress in construing federal statutes, as it is expressed in the plain language of such

statutes. The decision of the Circuit Court thus clearly violates the separation of powers doctrine and should be overruled, along with the *Cort* test which made it possible.

Furthermore, UMTA is unquestionably a federal financial assistance program. The express Congressional purpose of the legislation is to assist and encourage state and local entities to develop mass transportation systems through federal funding. UMTA is not a regulatory statute. Nowhere in the Act does Congress express an intent to interject the federal courts into local labor contract disputes or to preempt state remedies enforceable in state courts.

As is clearly expressed in Section 13(c) of UMTA, Congress intended that certain existing labor protections should be afforded to local transit employees as a precondition to receiving federal financial assistance. Congress does not expressly provide for federal judicial enforcement of the statutory provisions.

Likewise, nowhere in the legislative history of UMTA is federal judicial enforcement discussed. The only enforcement mechanism mentioned for Section 13(c) is the traditional mode of enforcement under such federal assistance programs — the denial or elimination of federal funds should certain conditions not be met. Since the language of the statute and its legislative history do not suggest that the Act was intended to create federal private labor rights, and because there is no evidence that Congress anticipated that there would be a federal private judicial remedy, such a federal private right of action should not be implied.

In addition, creation of an implied right of action under Section 13(c) violates the Tenth Amendment. The Court has held in *National League of Cities* v. *Usery*, 426 U.S. 33 (1976), and its progeny that the Tenth Amendment prevents the Congress from impairing basic attributes of state sovereignty in the

exercise of its power, among them the authority of the states to set the terms of employment of state and local transit workers. Yet, this prohibition of the Tenth Amendment is not limited in its application solely to Congress' power to regulate commerce. It does not apply selectively to certain powers of Congress and not to others, but reaches all Congressional authority. Thus, just as the Tenth Amendment bars the Congress from regulating state and local transit labor relations under the commerce power, it bars Congress from achieving the same effect under the spending power through the provisions of UMTA. Similarly, it prevents Congress from authorizing the federal courts to exercise such regulatory authority in the guise of a federal private right of action under its power over federal court jurisdiction. Nor can the courts undertake such regulation under their own powers. The Tenth Amendment acts as a restraint on the federal government as a whole and applies to federal courts as well as Congress. Therefore, creation of a federal private right of action violates the Tenth Amendment, and the decision of the Circuit Court upholding such a right should be reversed.

ARGUMENT

I. The City Of Jackson Did Not Violate Section 13(c) Of The Urban Mass Transportation Act, The Union Did Not Suffer An Injury Under The 1966 Federal Grant To The City, And In The Absence Of Both A Violation And An Injury There Is No Cause Of Action.

The principal and controlling issue of this case is whether Section 13(c) of the Urban Mass Transportation Act of 1964 (UMTA or the Act), 49 U.S.C. § 1609(c), creates a federal private right of action for an alleged breach of a local collective bargaining agreement, thereby conferring federal question jurisdiction on the federal courts. Preliminary to a resolution of this question, however, it must first be established that a cause of action, whether express or implied, exists under the facts presented.

Section 13(c) of the Act provides that as a condition of federal funding the recipient must first make "fair and equitable arrangements . . . to protect the interests of employees affected by such assistance," including, but not limited to: (1) "the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements;" (2) "the continuation of collective bargaining rights;" (3) "the protection of individual employees against a worsening of their positions with respect to their employment;" (4) "assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off;" and (5) "paid training or retraining programs." 49 U.S.C. § 1609(c). This provision of the Act, added as an amendment, was included in anticipation of the likelihood that certain municipalities under the program would acquire existing privately owned transportation companies, whose employees would lose their protection under the National Labor Relations Act (NLRA) because, as employees of a municipal agency, they would be exempted from NLRA authority. The obvious purpose of Section 13(c) was not to confer new rights on employees, extend the NLRA to include public employees, or enlarge the jurisdiction of the federal courts, but simply to assist such employees during the transition from private employment to public in making "fair and equitable arrangements" for the "preservation" of their "existing" rights and privileges. Believing that it was not "feasible to enumerate or set forth in great detail the provisions that may be necessary to assure the fair and equitable treatment of employees in each case," and giving no indication that Section 13(c) was intended to place municipal transit employees under the aegis of the NLRA or any other regulatory scheme, the authors of this legislation declared that "specific conditions" of employment would be "the product of local bargaining and negotiation" — subject not to the standards of national labor policy, but "to the basic standards of fair and equitable treat-

ment;" subject not to a judicial determination of their rights and privileges, but to an administrative determination by the Secretary of Labor, who "will assume responsibility for developing criteria as to the types of provisions that may be considered as necessary to insure that worker interests are adequately protected. . . . " S. Rept. No. 82, 88th Cong., 1st Sess. 28.

In order to qualify for a federal grant, Jackson entered into a so-called Section 13(c) Agreement in 1966 with Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC, which had served as the collective bargaining unit for the transit employees since 1943. This agreement was submitted to the Secretary of Labor, who certified that it met the "fair and equitable" standard of Section 13(c), and Jackson received a grant of $279,000. At this time Jackson also entered into a management contract with T. O. Petty to manage Jackson's transit system. Between 1966 and 1975, Petty and the Union made three collective bargaining agreements, each of three years duration.

The present dispute concerns none of these agreements, which the Union concedes were never breached, but the fourth collective bargaining agreement, covering the period between April 1, 1975 and April 1, 1978. Shortly after this agreement was negotiated, Petty resigned as manager and the management contract was terminated. Jackson notified the Union in December, 1975 that this fourth agreement was neither valid nor binding. Unsuccessful in its effort to gain a determination from either the Secretaries of Labor or Transportation that Jackson had violated the Section 13(c) agreement, the Union filed this action in the United States District Court for the Western District of Tennessee, seeking, *inter alia*, monetary and injunctive relief against Jackson. At the time this complaint was filed, Jackson had received no other UMTA grants since 1966.

Significantly, the Union's Complaint did not allege that Jackson had violated Section 13(c) or any other provision of

UMTA. This is not surprising in view of the fact that a Section 13(c) Agreement was executed in 1966, and certified by the Secretary of Labor as "fair and equitable" before Jackson received its grant. Nor has the Union claimed that any Jackson employees have suffered any injury under the 1966 grant. In brief, every requirement of Section 13(c) has been met.

Although the precise meaning of a "private cause of action" is not entirely clear, the term is generally understood to refer "to the right of a private party to seek judicial relief from injuries caused by another's violation of a legal requirement. In the context of legislation enacted by Congress, the legal requirement involved is a statutory duty." *Cannon* v. *University of Chicago*, 441 U.S. 677, 730 n. 1 (1979) (Powell, J., dissenting). Thus, in order to sustain a private cause of action, there must be both an *injury* and a *violation* of the statute. Respondent has claimed neither an injury under the 1966 grant nor a violation of Section 13(c).

Indeed, Section 13(c) imposes no legal obligation on the recipient of a grant that would give rise to a violation of the statute. If a municipality fails to make "fair and equitable" arrangements for the protection of employee interests, to the satisfaction of the Secretary of Labor, it incurs no legal penalty. At best, the disappointed grant applicant under Section 13(c) which cannot meet the precondition requirements suffers an economic loss through a denial of federal funding. The City of Jackson would not have been in violation of Section 13(c) had it been unable to produce an agreement acceptable to the Secretary of Labor.

But having once produced an acceptable "arrangement," the City met the only obligation explicitly imposed and knowingly accepted under Section 13(c); and that obligation was essentially a political one negotiated between the Secretary of Labor and the City of Jackson as a precondition to federal funding. Likewise, Section 13(c) does not state or imply that a recipient,

having met the condition and accepted the grant, thereby incurs a new, continuing legal obligation to the Union, subject to federal judicial enforcement. The singular obligation of the City of Jackson under Section 13(c) runs not to the Union, but to the Secretary of Labor.

It thus appears that the only statutory duty imposed by the provision in question is that placed upon the Secretary of Labor to determine whether the applicant for a grant has made satisfactory arrangements for the protection of employee interests. As the Court below has already acknowledged, the Secretary has no statutory duty to enforce Section 13(c) agreements after he has made an administrative determination that they are acceptable under the standards set forth in Section 13(c). 650 F.2d 1379 (6th Cir. 1981).

There being no injury under the 1966 grant and no violation of the statute (since none was prescribed), there can be no private cause of action, either express or implied, for which relief can be granted.

II. By Creating An Implied Right Of Action In The Absence Of An Expressed Intention By Congress To Confer Such Jurisdiction, A Federal Court Usurps The Authority Of Congress And Violates The Separation Of Powers

Section 13(c) does not define the meaning and substance of the rights and privileges enjoyed by public employees under a "fair and equitable" arrangement that the Secretary of Labor has approved. When it enacted UMTA, Congress "expected that *specific* conditions normally will be the product at *local bargaining and negotiation*, subject to the basic standard of fair and equitable treatment." S. Rept. No. 82, *supra* at 28. Whatever their content, then, the rights and privileges secured under Section 13(c) are bargained for by the employees and their representatives. No rights are conferred by the Secretary of Labor, whose function is simply to veto or accept a negotiated

settlement, subject only to the inchoate standard of fairness as determined by the Secretary.

As previously noted, Section 13(c) is equally silent regarding the form and substance of violations under its provisions. Understandably, therefore, Section 13(c) also makes no mention of a private right of action. In short, the provision in question confers no concrete rights on public employees, is mute on the question of what action constitutes a violation of such undefined rights, imposes no legal obligation on grant recipients to guarantee protection of such rights, and contains no express provision that a party claiming injury under Section 13(c) has a private right of action for federal judicial relief from injury caused by another's violation of a legal duty under the statute.

In the face of this reigning silence, which serves as the surest guide to legislative intent, the United States Court of Appeals for the Sixth Circuit has nevertheless held that Section 13(c) creates an implied private federal cause of action for employees of local transit authorities under the theory that, because "Section 13(c) reflects *national* labor policy" and preserves "federal rights," Congress implicitly intended that contracts embodying "fair and equitable" arrangements were to be enforceable in federal courts. 650 F.2d at 1383, 1385-86. Applying the analysis under *Cort* v. *Ash*, 422 U.S. 66 (1975), the Court concluded that all four factors characteristic of an implied right of action were present in Section 13(c).

The first factor under the *Cort* analysis requires that the plaintiff be "one of the class for whose *especial* benefit the statute was enacted." *Texas and Pacific R. Co.* v. *Rigsby*, 241 U.S. 33, 39 (1916) (emphasis added). The Court found that Section 13(c) "was enacted for the 'especial' benefit of transit employees," and without argument assumed that it "creates federal rights on their behalves *(sic)*." 650 F.2d at 1384. The second factor under *Cort* requires that there be some "indication

of legislative intent, explicit or implicit, either to create such a remedy or to deny one.'" *Id.* at 1384. Conceding that "legislative intent is the most significant" factor of the *Cort* analysis and acknowledging that the "legislative history of Section 13(c) is not explicit," the Court nevertheless concluded that Section 13(c) implied a private right of action "by default." *Id.* at 1385. The Court's reasoning on this point is not entirely clear, but the argument seems to be that Congress impliedly intended to provide federal judicial relief for a breach of a collective bargaining agreement because "[t]he Act offers no administrative solution to the problem of enforcing Section 13(c) agreements." *Id.* at 1385. Why Congress' silence cannot be interpreted as an intent to allow State tribunals to enforce such agreements the Court does not say, but the assumption seems to be that Section 13(c) confers "federal" rights that must be adjudicated by the federal judiciary. Such an assumption is, of course, based on the policy considerations of the Court rather than Congress; for state courts may and do litigate federal constitutional questions. "State judges in assuming office take an oath to support the federal as well as the state constitution."[1] This Court ought not indulge the presumption that Congress intended by its silence to enlarge the federal question jurisdiction of the federal courts in matters affecting the inchoate rights of public employees who are already under *state* coverage as a matter of *national* policy. *See, National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

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[1] "State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the state courts and give finality to their judgments on federal constitutional questions where a *full* and *fair* adjudication has been given in the state court." Sandra D. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 Wm. & Mary L. Rev. 814, 814-15 (1981).

It is submitted, therefore, that the four-factor analysis of *Cort* "is an open invitation to federal courts to legislate courses of action not authorized by Congress," *Cannon*, 441 U.S. at 731 (Powell, J., dissenting), and, although not necessary to a resolution of the case, that *Cort* v. *Ash*, should be overruled as an unconstitutional rule of statutory construction in violation of the separation of powers, as well as the decision of the Sixth Circuit in the case at hand.

In recent cases, this Court has repeatedly emphasized that the question whether a statute creates a private right of action is ultimately "one of Congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross* v. *Redington*, 422 U.S. 560, 578 (1979). *See, Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15-16 (1979); *Universities Research Ass'n* v. *Coutu*, ____ U.S. ____ , 101 S. Ct. 1451, 1461 (1981). In seeking an understanding of such intent, the focal point of inquiry is the status under which the right of action is claimed. "The question of the existence of a statutory cause of action is, of course, one of statutory construction." *Cannon*, 441 U.S. at 688; *Touche Ross & Co.*, 442 U.S. at 568. Thus, "as with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself." *Id.* at 568. The intent of the legislature, then, is the object of construction, but it is first to be sought in the words of the statute.

It is a cardinal and universal rule of statutory construction, dating back to the establishment of our government, however, "that if the statute is plain and unambiguous, there is no room for construction or interpretation. The legislature has spoken; their intention is free from doubt, and their will must be obeyed." Theodore Sedgwick, *Treatise on . . . the Interpretation and Construction of Statutory and Constitutional Law*, 194-95 (1874). Very early in the history of the American

Constitution, the Supreme Court embraced this rule of interpretation, insisting that "where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." *United States* v. *Fisher*, 2 Cranch 358, 399 (1805).

The fatal defect of the *Cort* analysis is that it improperly treats the silences of a statute as an ambiguity rather than its plain meaning, and seizes upon the absence of language as an excuse for excogitating the intent of Congress outside of the statute, or worse, for disregarding intent altogether in favor of extraneous considerations. As one member of this Court has astutely observed, "Of the four factors mentioned in *Cort*, only one refers expressly to legislative intent. The other three invite independent judicial lawmaking. Asking whether a statute creates a right in favor of a private party, for example, begs the question at issue. What is involved is not the mere existence of a legal right, but a particular person's right to invoke the power of the courts to enforce that right." *Cannon*, 441 U.S. at 740 (Powell, J., dissenting). The *Cort* analysis, in other words, is incompatible with the basic principle of statutory construction that "it is only when the language is ambiguous that the courts are called on to construe or interpret; and then . . . the object is to ascertain the intent of the Legislature." Sedgwick, *supra* at 195. "Nor is it lightly to be inferred," adds Cooley, "that any portion of a written law is so ambiguous as to require extrinsic aid in its construction." Thomas M. Cooley, *Treatise on Constitutional Limitations* 57 (1871).

Moreover, the *Cort* analysis, as applied under some circumstances, has been used to confer a right of action where none was expressed under the spurious theory that because Congress did not express an intent to *deny* a private cause of action, it must have intended by its silence to have created one. *See*, e.g., *Cort*, 442 U.S. at 82; *Cannon*, 441 U.S. at 694;

Transamerica Mortgage Advisors, 444 U.S. at 28 (White, J., dissenting). This rule of interpretation, it is clear, creates an arbitrary presumption and imposes an intolerable burden on Congress to affirm the non-existence of a private right of action whenever it enacts a law that is not intended to confer such a right. In opposition to such a principle of construction, this Court declared more than a century ago while construing the Embargo laws:

> it has been truly stated to be the duty of the court to effect the intention of the Legislature; but this intention is to be searched for in the words which the Legislature has employed to convey it . . . But should this Court conjecture that some other act, *not expressly forbidden* . . . might also be a preliminary step to a violation of the law, and ought therefore to be punished for the purpose of effecting the legislative intention, it would certainly transcend its own duties and powers, and would create a rule instead of applying one already made. [*Schooner Paulina's Cargo* v. *United States*, 7 Cranch 52, 60 (1813).]

In summary, the basic rules of statutory construction under the American doctrine of separation of powers demand, that where there is no ambiguity in the wording of a statute, and Congress has not expressly provided for a private cause of action, that none may be implied. *See, Cannon*, 441 U.S. at 731 (Powell, J., dissenting). "Where the meaning of the statute, as it stands, is clear, they [judges] have no power to insert qualifications, engraft exceptions, or make modifications under the idea of providing for cases to which the Legislature has omitted any specific provisions." Sedgwick, *supra* at 326. The conclusion is inescapable that "By creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve. This runs contrary to the established principle that '[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . . and conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction.'" *Cannon*, 441 U.S. at 746-47 (Powell, J., dissenting).

Accordingly, there is not only a "need to re-examine the *Cort* analysis," *Id.* at 742, but to recognize it as an unconstitutional exercise of judicial power requiring the reversal of *Cort* v. *Ash* and its progeny.

III. Congress Did Not Intend That The Urban Mass Transportation Act Of 1964 Provide A Federal Private Right Of Action.

A. *The Express Purpose Of The Urban Mass Transportation Act Of 1964 Is To Provide Financial Assistance, Not Exercise Regulatory Authority*

The Urban Mass Transportation Act of 1964, viewed in its entirety, is unquestionably a federal financial grant program, which was fashioned by Congress to assist in the remedy of certain stated urban problems. 49 U.S.C. § 1601(a). Congress determined "that Federal financial assistance for the development of efficient and coordinated mass transportation systems is essential to the solution of these urban problems." 49 U.S.C. § 1601(a)(3). The specific purposes for which the legislation was enacted are set forth in 49 U.S.C. § 1601(b):

> (1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;
>
> (2) to encourage the planning and establishment of areawide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass transportation companies both public and private; and
>
> (3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs.

Thus, the express Congressional objective underlying the legislation is to assist and encourage state and local entities to

develop mass transportation systems and programs through federal funding, as determined by local requisites. In passing UMTA the Congress exercised its federal spending power to deal with urban mass transit problems. It did not exercise any regulatory power to set out a federal labor policy over employees of the mass transit industry. [2] Nowhere in the Act does Congress express an intent: to legislate a body of new federal labor law for transit employees; to interject the federal courts into local labor contract disputes; or to preempt state remedies enforceable in state courts. Indeed, there is no dispute that UMTA does not expressly provide a federal private right of action.

The Respondent Transit Union, however, argued below that Section 13(c) of UMTA, 49 U.S.C. § 1609(c), provides the basis by which a federal private right of action should be implied by the federal courts in order to acquire jurisdiction over local labor contract controversies. [3]

As is clearly set forth in Section 13(c) of UMTA, Congress intended that certain existing labor protections should be afforded to employees who otherwise might be disadvantaged as a result of federal assistance under the Act. These protections are to be afforded before the grant is approved; they are preconditions or prerequisites to receiving federal funding assistance.

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[2] Indeed, this legislation was never referred to either the Senate Committee on Labor and Public Welfare or the House Committee on Education and Labor for consideration, but was the product of the Senate Committee on Banking and Currency, the Senate Committee on Commerce, and the House Committee on Banking and Currency.

[3] Respondent makes this contention even though, as Judge Merritt (dissenting) stated below: "There is no reason to think that state courts in the performance of their traditional, common law role cannot decide these private breach of contract cases just as fairly and just as efficiently as federal courts." 650 F.2d at 1389.

Moreover, UMTA contains several such provisions requiring certain preconditions for obtaining the federal funding,[4] as do numerous other federal financial assistance programs.[5] If Respondent is successful in its contention here, one could logically next conclude that Congress intended the enlargement of federal court jurisdiction from all of these many federal statutory provisions.

The Congress has provided for private federal rights of action on numerous occasions.[6] If Congress had intended to provide a private federal right of action under UMTA, it would have expressly done so, just as it has in these other instances. And absent such express provisions, courts should not indulge in legal fiction to imply such a right, particularly, as here, where (1) the issue in the case (alleged breach of a local collective bargaining agreement) only obliquely pertains to the federal statutory provision in question (Section 13(c) of UMTA) and, (2) there are adequate remedies available in state courts.

As Mr. Justice White recently stated in *California* v. *Sierra Club:*

> the focus of the inquiry is on whether Congress intended to create a remedy. (Citing *Universities Research Ass'n.* v.

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[4] For example, other preconditions include: (1) relocation assistance to displaced families (49 U.S.C. § 1606); (2) requirements regarding environmental protections (49 U.S.C. § 1610); and, (3) adequate assurance relating to required labor standards (49 U.S.C. § 1609(a)).

[5] Such provisions include: Section 103 of the National Mass Transportation Assistance Act of 1974, 49 U.S.C. §1602; Section 164 of the Federal Aid Highway Act of 1973, Pub. L. No. 93-87, 87 Stat. 250; Section 516 of the Railroad Revitalization and Regulatory Act of 1976, 45 U.S.C. § 836; and Section 801 of the Mental Health Systems Act, 42 U.S.C. § 9521.

[6] *See*, 42 U.S.C. § 1983 (civil action for deprivation of rights); 5 U.S.C. § 7123 (judicial review and enforcement of orders arising from federal labor-management relations administrative proceedings); and 42 U.S.C. § 2000c-8 (personal suits for relief against discrimination in public education).

Coutu, ____ U.S. ____ , ____ , 101 S.Ct. 1451, 1458, 67 L. Ed. 2d (1981); *Transamerica Mortgage Advisors* v. *Lewis*, 444 U.S. 11, 23-24 (1979); and *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575-576 (1979).) The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide. [____ U.S. ____ , 101 S. Ct. 1775, 1781 (1981).]

In *Cannon* Mr. Justice Powell expressed the same concern:

> *Under Art. III, Congress alone has the responsibility for determining the jurisdiction of the lower federal courts.* As the Legislative Branch, *Congress also should determine when private parties are to be given causes of action under legislation it adopts.* As countless statutes demonstrates, including titles of the Civil Rights Act of 1964, Congress recognizes that the creation of private actions is a legislative function and frequently exercises it. *When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction.* [441 U.S. at 730-31 (Powell, J., dissenting) (emphasis added).]

B. The Legislative History Of The Urban Mass Transportation Act Of 1964 Exhibits No Congressional Intent To Create A Federal Private Right Of Action

Nowhere in the legislative history of UMTA is federal judicial enforcement discussed. The only mention of judicial enforcement is a reference to state courts. This occurred during a Senate floor colloquy after Senator Morse, a strong supporter of labor protections, offered an amendment which subsequently passed the Senate, and which is substantially the same as the Section 13(c) provision. Senator Goldwater was especially concerned that the amendment would not preempt state law, particularly where strikes against public agencies are prohibited:

> Mr. GOLDWATER. *Then, as a final word the language proposed by the Senator from Oregon or the lan-*

guage of the bill as it now stands in no way would preempt State law.

Mr. MORSE. *The answer is yes;* and particularly as I have mentioned. If the collective bargaining should be taken over by a public agency in the exceptional case described, the right to strike against the public agency would be taken away from labor. But that is not a contractual right; it is not among the contractual rights the State agency must recognize in order to have an application for aid considered.

Mr. GOLDWATER. The right to strike against the public agency.

Mr. MORSE. Against the public agency where the State or local law forbids the right to strike.

Mr. GOLDWATER. If there is a local law, the language of the Senator from Oregon would not prevail.

Mr. MORSE. The Senator is correct.

Mr. GOLDWATER. If there is not a local law, would it be the interpretation of the Senator from Oregon that employees could strike in spite of the language in the "definitions" clause of the Taft-Hartley Act?

Mr. MORSE. *In the absence of any local law, it would be for the State court to decide whether they had that right.* [109 Cong. Rec. 5674 (1963) (emphasis added).]

The only enforcement mechanism for Section 13(c) is the traditional mode of enforcement under such federal assistance programs — denial or elimination of federal funds should certain conditions not be met. But it is not surprising that neither the language of the Act nor its legislative history suggest a federal private right of action for settling local transit union disputes, since the primary purpose of the legislation is to assist and encourage state and local entities, through federal funding, to develop mass transportation systems and programs. As District Judge Wellford stated below:

UMTA was intended to protect collective bargaining rights only secondarily. Congress addressed this issue to

> assure employees that existing rights and contracts would not be eliminated as part of the *initial grant process* to municipalities and that the grants under the Act would "not be used in a manner that is directly or indirectly detrimental to legitimate interests and rights of such workers." 2 *U.S. Code Congressional and Administrative News* p. 2584 (1964). *The federal officials charged with this responsibility have acted properly here by not involving themselves in continuous controversies between private (or public) parties to a contract approved by them.* [447 F. Supp. 88, 93 (W.D. Tenn. 1977) (emphasis added).]

Even the Circuit Court below, although finding federal jurisdiction in the case, could not provide any legislative history on which to imply a private federal right of action:

> The legislative history of Section 13(c) is simply not explicit. Our review of the Congressional debates establishes that the precise means of enforcing Section 13(c) agreements was not discussed. [650 F.2d at 1385.]

It seems reasonable to conclude that if Congress had intended a federal private right of action under UMTA, it would have expressly provided such a right, or at a minimum, provided a sound basis in the legislative history of the Act from which to infer such a right. There is no such manifestation of intent pertaining to this legislation.

Recently, in the *California* v. *Sierra Club* case, *supra*, this Court unanimously held that Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, does not create a private right of action. In the concurring opinion, Mr. Justice Rehnquist (joined by the Chief Justice, Mr. Justice Stewart and Mr. Justice Powell) clearly sets forth the dispositive standards which govern in such cases:

> . . . I am happy to agree with the Court that there is no implied right of action because "[*t*]*he language of the statute and its legislative history do not suggest that the Act was intended to create federal rights for the especial*

> *benefit of a class of persons," ante,* at 1781, *and because there is no evidence that Congress anticipated that there would be a private remedy." Id.,* at 1781. [*Id.* at 1784 (emphasis added).]

Should the Court determine, however, that there is an implied federal private right of action in this case, it will be interjecting the federal judiciary into every local transit union labor dispute for the foreseeable future, even though federal funding under UMTA has long since terminated. Further, the Court would be placing local public transit unions in a very favorable bargaining position *vis a vis* the state and local governments, since their Section 13(c) "precondition employee protections" could never be eroded, regardless of changes in policy at the state and local level made through the democratic processes by elected government officials. The Court, in effect, would be requiring a contract with certain protections in these cases in perpetuity. Moreover, lower federal courts, on the basis of such an UMTA precedent, would necessarily find that federal private rights of action exist, by mere implication, in all the numerous other federal grant programs with preconditions for obtaining funding assistance — a result certainly not intended by Congress.

IV. The Creation Of An Implied Right Of Action For An Alleged Breach Of A Collective Bargaining Agreement Between Public Transit Employees And Jackson Violates The Tenth Amendment To The Constitution

In *National League of Cities* v. *Usery, supra,* this Court held that the Tenth Amendment to the Constitution constituted a limitation on the power of Congress to regulate commerce among the states, and that the 1974 amendments to the Fair Labor Standards Act, prescribing minimum wage and maximum hour requirements for all public employees employed by the states and their political subdivisions, impaired the states' ability to function effectively in a federal system. "We have repeatedly recognized," said the Court,

> that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congrss may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. [*Id.* at 851.]

In its examination of those "attributes of sovereignty," the Court reasoned that "[o]ne undoubted attribute" was the reserved power of the states to determine the wages and hours of their public employees who carry out governmental functions. The application of the 1974 amendments to such employees, the Court concluded, would

> significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. [426 U.S. at 851.]

By parity of reasoning, the Tenth Amendment to the Constitution also limits the spending power of Congress under Article I, § 8, Cl. 1, the power upon which UMTA rests. Although the spending power is not limited by the specific grants of power contained in Article I, § 8, it is qualified by the Tenth Amendment to the extent that Congress may not use moneys raised by taxation to regulate the working conditions of state and municipal employees. What Congress may not regulate under the commerce power, it may not regulate under the spending power; indeed, it may even be doubted whether the spending power includes any element of regulatory or police power, since it is not an independent grant of power, but a qualification of the taxing power.

It necessarily follows that even if Congress intended under Section 13(c) to enlarge the federal question jurisdiction of the federal courts to entertain federal private rights of action for

breaches of collective bargaining agreements between municipalities and public transit unions, that the Tenth Amendment would be a barrier to such action. What Congress cannot constitutionally accomplish under its commerce or spending power, it may not accomplish under its Article III power to regulate the jurisdiction of the federal courts; for the Tenth Amendment is not selectively applied to the delegated and implied powers of Congress. Nor is the federal judiciary exempt from its provisions, since the purpose of the Amendment is to limit the powers of the national government and not simply those of Congress. Thus, what Congress may not regulate under the commerce power, it may not regulate under Article III. The restrictions established in *Usery* may not be sidestepped by invoking a different power to achieve the same result, or by granting new powers to the federal courts to achieve what it cannot. Direct federal grants to municipalities, which by pass the state governments, can be viewed as an encroachment upon the reserved powers of the states to be constitutionally suspect, but surely the intrusion of the federal judiciary into the local affairs of their political subdivisions and employee relationships under such grants is an unconstitutional interference with the "essential attributes" of state sovereignty.

But it is abundantly clear from an examination of the legislative history of UMTA and from the absence of any express language in Section 13(c) that Congress never intended to expand the federal question jurisdiction of the federal courts in order to nationalize local collective bargaining agreements or place them under federal judicial scrutiny. And an implied intent to accomplish this result is not enough. As we are reminded by Mr. Justice Brennan, speaking for the Court in *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 142 (1963), "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject

matter permits no other conclusion, or that Congress has unmistakably so ordained." And on this very issue, Congress declared its intentions when it enacted UMTA: "In regard to the question as to whether these provisions [Section 13(c)] would supersede State labor laws, the committee concurs in a statement made by the Secretary of Labor 'that there could be no superseding of State laws by a provision of this kind.' " S. Rept. No. 82, *supra* at 29.

CONCLUSION

For the reasons developed above, the Public Service Research Council respectfully urges the Court to reverse the decision of the Circuit Court.

Respectfully submitted,

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No. 81-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE,
Petitioners,

v.

LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR THE RAILWAY LABOR EXECUTIVES' ASSOCIATION, AS AMICUS CURIAE

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
MOTION:	
Interest of the RLEA and the Issues to be Covered in the RLEA's Brief Amicus Curiae	v
Conclusion	vii
BRIEF:	
Argument	1
Congress Intended that the Employee Protection Afforded in Section 13(c) Would be Enforceable in the Federal Courts in the Same Manner as That Protection Provided in Section 5(2)(f) of the Interstate Commerce Act	1
Conclusion	13

TABLE OF AUTHORITIES

Cases:	Page
Brotherhood of Maintenance of Way Employes v. United States, 366 U.S. 169, 173-174 (1961)	2
Chicago & N.W. R. Co. v. United Transportation Union, 402 U.S. 570, 576 (1971)	2
Hisquierdo v. Hisquierdo, 439 U.S. 572, 574 fn. 3 (1979)	2
International Association of Machinists v. Central Airlines, 372 U.S. 682 (1963)	9
International Association of Machinists v. Street, 367 U.S. 740, 758 (1961)	2
Local Division 1285 v. Jackson Transit Authority, 650 F.2d 1379, 1382 (6th Cir. 1981)	13
Nemitz v. Norfolk and Western Railway Co., 287 F.Supp. 221 (N.D. Ohio, 1968) and 309 F.Supp. 585 (N.D. Ohio 1969), *aff'd*, 436 F.2d 841 (6th Cir. 1971), *aff'd*, 404 U.S. 37 (1971)	11, 12
Railroad Retirement Board v. Duquesne Warehouse Company, 326 U.S. 446, 451 (1946)	2
Railway Employes' Dept. v. Hanson, 351 U.S. 225 (1956)	2, 9
Railway Labor Exec. Assoc. v. United States, 339 U.S. 142, 147-149 (1950)	2
Statutes:	
Federal Railroad Safety Authorization Act of 1976, 45 U.S.C. § 421 *et seq.*	2
Interstate Commerce Act, 49 U.S.C. § 5(2)(f)	vii, 2, 9, 10, 11, 12
Railroad Retirement Act, 45 U.S.C. §§ 231 *et seq.*	2
Railroad Unemployment Insurance Act, 45 U.S.C. § 351 *et seq.*	2
Railway Labor Act, 45 U.S.C. § 151 *et seq.*	2, 9
Urban Mass Transportation Act of 1963, 49 U.S.C. § 1601 *et seq.*	vii, 4
Section 13(c), 49 U.S.C. § 1609(c)	*passim*
Miscellaneous:	
Hearings on S.6, Subcommittee on Housing of the Sen. Comm. on Banking and Currency, 88th Cong., 1st Sess. (1963)	*passim*

TABLE OF AUTHORITIES—Continued

Page

Hearings on H.R. 3881, House Comm. on Banking and Currency, 88th Cong., 1st Sess. (1963) ..... *passim*
Hearings on H.R. 11158 before Subcommittee No. 3 of House Comm. on Banking and Currency, 87th Cong., 2d Sess. (1962) 3
H. Rep. No. 94-384, 94th Cong., 1st Sess., 1975 U.S. Code Cong. & Admin. News 892-893 2
S. Rep. No. 93-1163, 93d Cong., 2d Sess. 1974 U.S. Code Cong. & Admin. News 5702-5725 2
S. Rep. No. 94-855, 94th Cong., 2d Sess., 1976 U.S. Code Cong. & Admin. News 1534-1537 2
109 Cong. Rec. 5322 4
109 Cong. Rec. 5670-5684 ..... 6, 7, 8, 9, 10

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MOTION BY THE RAILWAY LABOR EXECUTIVES' ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Railway Labor Executives' Association (RLEA) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of the respondent in this case. Both Petitioner and Respondent have consented to the filing of this brief; the letters granting consent have been filed with the Clerk of this Court.

INTEREST OF THE RLEA AND THE ISSUES TO BE COVERED IN THE RLEA'S BRIEF AMICUS CURIAE

The Railway Labor Executives' Association (RLEA) is an unincorporated association composed of the chief executives of nearly all of the standard international and national labor organizations representing employees in the railroad industry. The following organizations are currently affiliated with the RLEA:

American Railway & Airway Supervisors Association
American Train Dispatchers Association
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood Railway Carmen of the United States and Canada
Brotherhood of Railway, Airline & Steamship Clerks
Hotel Employees & Restaurant Employees International Union
International Association of Machinists & Aerospace Workers
International Brotherhood of Boilermakers & Blacksmiths
International Brotherhood of Firemen & Oilers
International Longshoremen's Association
International Organization of Masters, Mates & Pilots of America
National Marine Engineers' Beneficial Association
Railroad Yardmasters of America
Sheet Metal Workers International Association
International Brotherhood of Electrical Workers
Seafarers International Union of North America
United Transportation Union
Transport Workers Union of America

The RLEA's objectives include promoting and securing improved wages, hours and working conditions of rail workers through collective bargaining, legislation, legal action, and other appropriate means.

The RLEA's interests in this case are not identical to those of the respondent Local Division 1285, Amalgamated Transit Union, which is not an RLEA affiliate. Division 1285 seeks to vindicate the rights of the employees whom it represents. The RLEA, on the other hand, wishes to represent and protect the interests of the many rail employees who belong to and/or are represented in a collective bargaining capacity by its constituent labor organizations. The resolution of the question presented in this case will determine whether or not the members of the RLEA affiliates will continue to enjoy access to the federal court system to enforce the protective rights and benefits which Congress afforded them in Section 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609(c). The RLEA and its affiliates therefore have a major interest in the outcome.

The attached brief *amicus curiae* is devoted to showing that in enacting Section 13(c), Congress envisioned a uniform scheme of employee protection, similar to that provided in former Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f) (now § 11347), under which the contracts negotiated would be enforceable in the federal courts in the same manner as the agreements reached under Section 5(2)(f).

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF FOR THE RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amicus curiae* in this case is set forth in that motion.

ARGUMENT

Congress Intended That The Employee Protection Afforded in Section 13(c) Would be Enforceable in the Federal Courts in the Same Manner as That Protection Provided in Section 5(2)(f) of the Interstate Commerce Act

As this Court is well-aware, the regulation of labor relations in the transportation industries is one that has evolved through the direct participation of rail labor in

the legislative process. For example, this Court has frequently referred to the fact that the Railway Labor Act "was, and was acknowledged to be, an agreement worked out between management and labor, and ratified by the Congress and the President." *Chicago & N.W.R.Co. v. United Transportation Union*, 402 U.S. 570, 576 (1971). See *International Association of Machinists v. Street*, 367 U.S. 740, 758 (1961); *Railway Employes' Dept. v. Hanson*, 351 U.S. 225, 240 (1956) (Frankfurter, J., concurring). Similarly, in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 574 fn. 3 (1979), the Court noted how the Railroad Retirement Act, 45 U.S.C. §§ 231 *et seq.*, in its various amended forms, resulted from the direct input of rail labor in the negotiation and legislative process. See S. Rep. No. 93-1163, 93d Cong., 2d Sess., 1974 U.S. Code Cong. & Admin. News 5702-5725; *Railroad Retirement Board v. Duquesne Warehouse Company*, 326 U.S. 446, 451 (1946). See also, H. Rep. No. 94-384, 94th Cong., 1st Sess., 1975 U.S. Code Cong. & Admin. News 892-893 (Railroad Unemployment Insurance Act, 45 U.S.C. § 351 *et seq.*); S. Rep. No. 94-855, 94th Cong., 2d Sess., 1976 U.S. Code Cong. & Admin. News 1534-1537 (Federal Railroad Safety Authorization Act of 1976, 45 U.S.C. § 421 *et seq.*).

Rail labor was also intimately involved when Congress considered the question of providing mandatory protection for the interests of rail employees affected by consolidations and mergers. Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f), was derived from the recommendation of a presidentially-appointed committee composed equally of representatives of railroad management and railroad labor. *Railway Labor Exec. Assoc. v. United States*, 339 U.S. 142, 147-149 (1950). It too resulted from an industry agreement. *Id.* at 147-149. See *Brotherhood of Maintenance of Way Employes v. United States*, 366 U.S. 169, 173-174 (1961).

Thus, when comprehensive urban mass transportation legislation was introduced in the 87th Congress, rail labor was present to protect the interests of its members. At that time, in 1962, labor expressed its belief to Congress that "there is a clear national responsibility to assist in development of mass transportation systems in urban areas." Hearings on H.R. 11158 before Subcommittee No. 3 of House Comm. on Banking and Currency, 87th Cong., 2d Sess. (1962), p. 422 (Biemiller Testimony). The bill under consideration, however, contained no assurances that urban mass transportation employees would enjoy collective bargaining rights, a deficiency in the legislation which labor sought to have remedied. Citing both examples of harmony where this was done voluntarily and discord where collective bargaining had been rejected by new municipal management, labor urged Congress to include the right of employees to bargain collectively in "any law which provides Federal support for . . . mass transportation utilities . . . whether in the form of grants, loans or Federal guarantees of loans for transit utilities." *Id.* at 423-424.

Specifically, Congress was told by AFL-CIO Director of Legislation Andrew Biemiller about the success of transit operations in Los Angeles, Pittsburgh, Boston, Chicago and Philadelphia wherein collective bargaining rights were guaranteed, and about the "scandalous, disgraceful situation" in Dade County, Florida, where such rights were being repudiated. *Id.* at 423-425. Biemiller asked for the addition to the bill of provisions "to protect public utility workers in the right to union recognition, the right to collective bargaining, the right to negotiate with management and the right of access to channels for grievance and dispute settlement." *Id.* at 423. H.R. 11158 was never amended in this regard and it died in Committee.

The legislation resurfaced in the 88th Congress as S. 6 and H.R. 3881. Rail labor again participated in the legis-

lative process. 109 Cong. Rec. 5322. Like its predecessor legislation, what was to become the Urban Mass Transportation Act of 1963, 49 U.S.C. § 1601 *et seq.*, when originally introduced did not contain a strong labor protective section. Hearings on S. 6, Subcommittee on Housing of the Sen. Comm. on Banking and Currency, 88th Cong., 1st Sess. (1963), at 318, 319, 361 (hereinafter "Sen. Hearings") and Hearings on H.R. 3881, House Comm. on Banking and Currency, 88th Cong., 1st Sess. (1963), at 487, 624-626 (hereinafter "House Hearings"). However, revelation that public officials in Dade County, Florida had blatantly destroyed union recognition and representation for purposes of collective bargaining after the County took over operations of a private city transit system stirred labor and the Kennedy Administration to insist that the legislation include provisions to protect collective bargaining rights. Sen. Hearings at 319; House Hearings at 487, 491-492.

What happened in Dade County was explained in detail to Congress by Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America (now Amalgamated Transit Union) General Counsel Bernard Cushman. House Hearings at 565-567, 624; Sen. Hearings at 325, 361, 367. Simply put, a public agency took over a transit system which had been operating privately and had a longstanding collective bargaining relationship with a union of its employees. Immediately following the takeover, the new, public employer abrogated all past agreements, refused to recognize the union, and totally dismantled the longstanding relationship. The employees lost all their previously bargained-for rights.[1]

Not only organized labor condemned the Dade County situation to Congress. Secretary of Labor Wirtz was also

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[1] Conversely, labor again delineated for Congress the stability in labor relations experienced by those transit systems which recognized the principles of collective bargaining. Sen. Hearings at 325-327, 362-364, 380-381. House Hearings at 487-488.

asked to comment on that problem while explaining the Administration's proposed labor standards provisions. He too acknowledged that "the development of Miami's mass transportation system was accomplished at a price in terms of collective bargaining," a price "which it is unfortunate was paid." Sen. Hearings at 314. Wirtz emphasized to the Congress the importance "that it be made clear that the program will not be administered in a way which will result in the destruction of established collective bargaining rights." Sen. Hearings at 309.

Nevertheless, the amendment to the legislation proposed by the Administration did not provide the explicit protections which labor was seeking. House Hearings at 632, 643, 644; Sen. Hearings at 322, 375-376, 380-381. The weakness perceived by labor in the Administration's proposal lay in the proposal's excessive generality and its total reliance on the discretion of the Administrator and the Secretary of Labor to determine the appropriateness of the protections offered by those seeking assistance.

Believing "that a more detailed specification of these protections would be in order," the AFL-CIO, RLEA, and Amalgamated Association sought a more substantive description of the labor protection to be afforded. House Hearings at 494-495, 636-638; Sen. Hearings at 322-323. Thus, the stage was set for floor debate.

Section 13(c), 49 U.S.C. § 1609(c), as ultimately enacted was submitted as an amendment to S.6 by Senator Morse.[2] He explained its purpose as follows:

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[2] Sen Morse proposed the following:

> "(c) It shall be a condition of the granting of any assistance or the financing of any project under this Act that fair and equitable arrangements are made, as determined jointly by the Administrator and the Secretary of Labor, to protect the interests of employees affected by such assistance or financing. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including the

Paragraph 13(c) concerns the protective arrangements respecting interests of employees affected by the bill. As we know, any legislation which is intended to provide Federal aid for the purpose of strengthening and improving our urban area mass transportation systems must be concerned with another highly important factor, the stability of labor relations. *It is a necessary corollary of any such consideration that there be provisions which would safeguard employee rights and promote and maintain the national labor policy* with a view toward insuring labor relations stability and promoting employee morale. [Emphasis added]

The danger in the [committee] bill as reported is that it could seriously disrupt collective bargaining, which has had such a long and successful history in the mass transportation field. Accordingly, the amendment provides protections for the interests of employees who may be affected by the assistance or financing provided under this legislation. The amendment would protect existing employee rights, including pension rights; would continue collective bargaining where it now exists; would protect indi-

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continuation of pension rights and benefits of all beneficiaries) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining in any situation where it now exists; (3) the protection of individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to the provisions of section 5(2)(f) of the Interstate Commerce Act; (4) assurances of employment to employees of acquired mass transportation systems by the acquiring or operating entities, and priority of employment or reemployment of employees terminated or laid off; and (5) paid training or retraining programs. The contract for the granting of any such assistance shall specify the terms and conditions of such protective arrangements."

Except for a House amendment deleting the participation of the Housing Home Finance Administrator in the determination of fairness and equitableness of the arrangements, the Morse Amendment became law. 49 U.S.C. § 1609(c).

> vidual employees against their positions being worsened, with a reasonable floor of protection being that already established for the transportation industries subject to Federal regulation, would provide a continuation of the employment relationship where mass transportation systems are acquired by a new employer with assistance under this act.

109 Cong. Rec. 5670-5671.

Senator Morse fully understood that issues of national public policy permeated his proposal:

> The question of policy is this: Should the Federal Government make available to cities, States, and local governmental units Federal money to be used to strengthen their mass transit system in those communities when the use of that money would result in lessening the collective bargaining rights of existing unions?
>
> As a matter of Federal public policy, can we justify the use of Federal dollars to weaken what I hope is true, namely, that collective bargaining between free labor and free employers is a basic and essential part of the American economic freedom? If we qualify that, and if we are not willing to agree to that premise, then I can see that individual Senators may have some decided differences with the senior Senator from Oregon with respect to the amendment.
>
> However, let me state my position. In my judgment we cannot justify, as a matter of public policy, the use of Federal dollars by a local community or a governmental unit thereof to be spent for development of a transit system, the expenditure of which would result in worsening the present collective bargaining rights of free labor which operates that transit system.

109 Cong. Rec. 5671.[3] See also 109 Cong. Rec. 5672, 5684.

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[3] This purse-string approach was suggested by organized labor during the Committee hearings. Sen. Hearings 366; House Hearings 633-634, 640, 663.

Thus, Morse posed the issue to his colleagues as a choice between "underwrit[ing] and approv[ing] free collective bargaining as national policy, or [passing] a bill which . . . will weaken free collective bargaining." 109 Cong. Rec. 5684. To do the latter, Morse predicted, would "intensify labor conflict in this country." *Id.*

Senator Morse made clear to the Senate that his proposal represented a compromise between the position of the Administration and that of organized labor. 109 Cong. Rec. 5672. Organized labor's proposal sought to require collective bargaining whenever federal monies were used to establish or otherwise assist a transit system. Sen. Hearing at 322-323; House Hearing at 494-495. Morse's proposal required collective bargaining only where it already existed at the time of a public takeover. 109 Cong. Rec. 5672. Nevertheless, insofar as these status quo rights were concerned, he adamantly rejected Administrative language which he considered wishy-washy and which "cannot be subjected to a definition that gives any real protection to labor." 109 Cong. Rec. 5675. Absent a statutory expression stronger than mere "encouragement," Morse warned that "collective bargaining agreements could be ignored or set aside by systems of public ownership." *Id.*

Senator Morse continually reiterated this overriding public policy issue throughout the debate. 109 Cong. Rec. 5675, 5677. Thus, by the time of final passage, there could be little doubt that Section 13(c) was intended to preserve and protect a national labor policy in favor of a free collective bargaining resulting in binding agreements.

The denial of access to the federal courts could only frustrate this explicit national labor policy underlying the statute. As noted above, rail labor sought from Congress a binding enforcible mechanism to secure the protection Section 13(c) requires. It did not do so against a bare backdrop; rather, the unions related their demands to the existing pattern of collective bargaining under

the Railway Labor Act and employee protection under Section 5(2)(f) of the Interstate Commerce Act. 49 U.S.C. § 5(2)(f). With regard to collective bargaining, RLEA chairman G. E. Leighty pointed out that the public operation of transportation systems under collective bargaining agreements was not unusual and identified for Congress several public authorities whose operations were conducted without difficulty under the provisions of the Railway Labor Act. House Hearings at 642. Labor sought and Senator Morse intended that under 13(c) the public operator succeed to the obligations of the private operator and extend to the employees the same contractual provisions they had under private operations. 109 Cong. Rec. 5676. Under private operation, of course, labor agreements possess the imprimatur of federal law and are enforcible accordingly. *International Association of Machinists v. Central Airlines*, 372 U.S. 682 (1963); *Railway Employes' Dept. v. Hanson, supra*, 351 U.S. at 232.[4]

With regard to the possible adverse effects of mergers, consolidations or technological change, labor was particularly concerned with the failure of the original bill to incorporate existing federal transportation policy embodied in the employee protection provisions of Section

[4] In *Central Airlines*, this Court rejected arguments that would have closed the federal courts to litigation over awards of privately established adjustment boards which were mandated by the Railway Labor Act. To the extent that the contract establishing the board which rendered the award in *Central Airlines* imposed a duty consistent with the RLA to comply with the award, this Court deemed "that duty [to be] a federal requirement." 372 U.S. at 695. Analogously, in the circumstances presented here, to the extent that the 13(c) agreement imposed a duty consistent with the UMTA to continue collective bargaining and preserve existing contracts, that duty too should be deemed a federal requirement. If 13(c) agreements are to serve the public policy functions enunciated by the Congress, "their validity, interpretation, and enforceability," like the contractual arrangements in *Central Airlines*, "cannot be left to the laws of the many States, for it would be fatal to the goals of the [UMTA] . . . if a contract were struck down even though in furtherance of the federal scheme." 372 U.S. at 691.

5(2)(f) of the Interstate Commerce Act. Sen. Hearings at 330, 373; House Hearings at 563, 566, 569, 607-608, 642. RLEA Chairman Leighty iterated rail labor's belief that "where Federal money is used to deprive an employee of his job the Federal Government should provide for the alleviation of the economic burden which it has placed upon the employee, by positive protection, no less than those established pursuant to the provisions of Section 5(2)(f) of the Interstate Commerce Act." House Hearings at 642.

Section 5(2)(f), of course, was essentially a codification of the industry-wide Washington Job Protection Agreement of 1936 negotiated between the nation's railroads and rail unions. It encompasses, as Senator Morse explained, "a very precious right which has been won by railway labor," a right which "has become a cornerstone governing layoffs and position downgrading in the federally regulated transportation industries for many years." 109 Cong. Rec. 5679. This "law of employee protections in the railroad industry for railroad employees" was precisely what rail labor urged that Congress include in the bill. House Hearings at 570; Sen. Hearings at 330. Absent the provision of these minimum protections in Section 13(c), the bill did "not adequately protect the legitimate rights of labor." 109 Cong. Rec. 5676.

Section 5(2)(f) provided that "as a condition of approval" in rail mergers and consolidations the Interstate Commerce Commission "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." 49 U.S.C. § 5(2)(f), (§ 11347 as amended).[5] Such an arrangement could either be imposed

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[5] In its totality, Section 5(2)(f) provided:

"As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the

by the Commission or agreed to by the parties with Commission approval. *Nemitz v. Norfolk and Western Railway Co.*, 287 F. Supp. 221 (N.D. Ohio, 1968) and 309 F. Supp 585 (N.D. Ohio 1969), aff'd., 436 F. 2d 841 (6th Cir. 1971), aff'd., 404 U.S. 37 (1971), settled the question whether such agreements by the parties were enforceable in federal courts. There, as here, the employer sought to avoid federal jurisdiction by belittling the agreement which specifically set forth the parties' substantive rights. As the District Court in *Nemitz* properly observed, no

> "legal effect should be attached to the *source* of the conditions imposed by the Commission pursuant to the mandate of Section 5(2)(f). Whether the protective terms have their genesis in other merger cases, or prior agreements between the parties subject to the order of approval about to be entered by the Commission, should make no difference; the provisions set forth or incorporated by reference in the original ICC order form the basis of the employee's rights."

287 F.Supp. at 221. The Court of Appeals and this Court affirmed, finding the Commission's adoption or approval of the agreement between the union and the employer renders the agreement a " 'condition' of the Commission's

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Commission shall include terms and conditions providing that during the period of four years from the effective date of such order, such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

'approval' of the consolidation." 404 U.S. at 43. Thus, for the purposes of federal court jurisdiction, the rights set forth are incorporated in the Commission's order and are deemed to flow from it.

Applying the *Nemitz* analysis here, the Section 13(c) agreement between the transit authority and the union formed the basis for the Secretary of Labor's certification that a fair and equitable arrangement had been reached. Because the Secretary acted pursuant to the mandate of 13(c), the protections derived from the agreement serve the same statutory function as those negotiated pursuant to Section 5(2)(f). Thus, they too should be enforceable in the federal courts.

Plainly, in patterning its Section 13(c) proposal to Congress on Section 5(2)(f), rail labor contemplated an enforcement scheme within the federal courts. The legislative history provides no basis whatsoever to infer that the Congress intended otherwise. In fact, the failure of the debate surrounding the Section 5(2)(f) reference raises just this inference, *i.e.*, that the same federal forum available for Section 5(2)(f) lawsuits would be open to Section 13(c) enforcement actions. In fact, the denial of federal jurisdiction here would mark a distinct departure from the longstanding uniform availability of the federal courts to enforce the federally-created rights of rail labor.

Petitioner, of course, contends to the contrary and asserts that the only forum open to enforce Section 13(c) agreements, if they are enforceable at all, is the state court system. If this approach is adopted, the rights protected by Section 13(c) and the agreements negotiated thereunder will vary, expand, and contract according to the laws and customs of fifty separate states. Preexisting rights and obligations which were uniform before the infusion of federal funds likely will become disparate following UMTA grants, resulting in a hodge-podge of different arrangements. National railroad unions, whose members work under essen-

tially identical Section 13(c) agreements certified by the Secretary of Labor will be forced to consult with counsel in a multitude of different states before making a move which may well be permissible in one place, required in another and prohibited in a third. This lack of uniformity in treatment certainly is not the status quo intended by Congress when it conditioned federal financial assistance to the transit authorities upon the authorities' commitment that the existing rights of employees will be preserved.

The Court below properly concluded that a "Section 13(c) agreement is a mandatory means of preserving rights created by a federal statute" and therefore can be enforced in a federal court. *Local Division 1285 v. Jackson Transit Authority*, 650 F.2d 1379, 1382 (6th Cir. 1981). As shown above, its judgment reflects a proper analysis of the intent and effect of Section 13(c).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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Docket No. 81-411

In the Supreme Court of the United States

October Term, 1981

JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE,
Petitioners,

vs.

LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER ON BEHALF OF TIDEWATER TRANSPORTATION DISTRICT COMMISSION

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QUESTIONS PRESENTED

1. Whether Congress, in enacting the Urban Mass Transportation Act of 1964, 49 U.S.C.§1601, et seq., intended to create a federal transit labor law enforceable in, and by, federal courts to govern contract disputes between public transit authorities and their employees. (Discussed in Argument I.)

2. Whether Congress in enacting the Urban Mass Transportation Act of 1964, 49 U.S.C. §1601, et seq., intended to authorize federal courts to formulate a "federal common law" to govern contract disputes between local public transit authorities and their employees. (Discussed in Argument I.)

3. Whether an employee's, or union's, claim that a municipal transit

authority breached a collective bargaining agreement executed in 1975 states a "claim arising under the laws of the United States" within the meaning of 28 U.S.C. §1331(a) solely because the municipal transit authority received federal funds, in 1966, through a grant authorized by the Urban Mass Transportation Act of 1964, 49 U.S.C. §1601, et seq. (TTDC does not take up the "merits" of this question except to adopt the views expressed by Petitioner.)

4. Whether Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. §1609(c), creates a federal private cause of action for an alleged breach of a collective bargaining agreement, executed in 1975, by a municipal transit operator who received federal funds

under the Act, in 1966. (TTDC does not take up the "merits" of this question except to adopt the views expressed by Petitioner.)

TABLE OF CONTENTS

	Page
Interest of Amicus	1
Summary of Argument	8
Argument	10
I. The Urban Mass Transportation Act Does Not Create, and Congress Did Not Intend to Create, Any Body of Federal Transit Labor Law That Would Supersede Local Public Employee Law	10
Conclusion	16

TABLE OF AUTHORITIES

Cases

	Page
Division 1177, Amalgamated Transit Union v. Tidewater Transit District Commission, No. 79-968-N (E.D. VA. Nov. 8, 1979)	6
Division 1177, Amalgamated Transit Union v. Tidewater Transit District Commission, No. 81-1112-N (E.D. VA. Nov. 23, 1981)	7
Local Division 589, etc. v. Massachusetts, ____ F.2d ____ (1st Cir. 1981) (Supplemental Pet. Apx. at 1a-55a)	12, 13, 14
Local Division 1285, etc. v. Jackson Transit Auth., 650 F.2d 1379 (6th Cir. 1981)	15

TABLE OF AUTHORITIES

Statutes

	Page
44 U.S.C.	
§1601, et seq.	3
§1601(b)(3)	11
§1608(d)	11
§1609(c) 3, 4,	15
LA. REV. STAT. ANN. §23:890 (West Cumm. Supp. 1981)	14
N.J. STAT. ANN. §40:37 A-96 (West Cumm. Supp. 1981-1982) . .	14
N.M. STAT. ANN. §3-52 (1978) . . .	14
OHIO REV. CODE ANN. §306.12 (1979)	14
PA. STAT. ANN. tit. 53 §39951 (Purdon Cum. Supp. 1981-1982) .	14
R.I. GEN. LAWS §39-18-17 (1977). .	14
W.VA. CODE §8-27-21 (1976)	14
VA. CODE	
§15.1-1342, et seq. . . .	2
§15.1-1357	4
§15.1-1357.2 3,	15

SUPPLEMENTAL AUTHORITIES

Page

109 Congressional Record (1963) . . 12

U.S. News & World Report,
August 31, 1981, at 21 7

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER ON BEHALF OF TIDEWATER TRANSPORTATION DISTRICT COMMISSION

INTEREST OF AMICUS CURIAE

Tidewater Transportation District Commission (TTDC) is a political subdivision of the Commonwealth of Virginia,

created and existing pursuant to the Transportation District Act of 1964, VA. Code §15.1-1342, et seq. In accord with Supreme Court Rule 36.4, this Brief Amicus Curiae is sponsored by the authorized law officer of TTDC. A TTDC resolution authorizing this Brief and a letter of sponsorship from TTDC's law officer is on file with this Court.

TTDC is a medium-sized Transit Authority, providing public transportation in and for the cities of Norfolk, Portsmouth, Chesapeake, Virginia Beach and Suffolk, Virginia.[1] To this end, TTDC: (1) operates buses on fixed route services; (2) leases vans and

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[1]According to the most recent Bureau of Census report (1980), TTDC serves a total population of 795,612.

buses to private concerns for commuter transportation and other services; (3) purchases maxi-ride services from private taxi operators for low-volume travel areas; and (4) operates vans and special services for the elderly and handicapped.

To subsidize its operation, TTDC receives local and state monies, and, additionally, receives federal funds under the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. 1601, et seq. (UMTA). Like the Jackson Transit Authority (Jackson), TTDC is subject to the provisions of 49 U.S.C. §1609(c) and the certification procedures of the Department of Labor. Similarly, TTDC is authorized by state statute to collectively bargain with its employees.[2]

[2]VA. CODE §15.1-1357.2. The language of this section is identical, in large part, to 49 U.S.C. §1609(c) of the Urban Mass Transportation Act:

Protection of employees of public transportation systems.--In any county or city, the commission referred to in §15.1-1357, in addition to other prohibitions, shall not operate any such transit facility, or otherwise provide or cause to be provided, any transportation services, unless fair and equitable arrangements have been made for the protection of employees of existing public transportation systems in the transporation district or in the metropolitan area in which the transportation district is located. Such protections shall include (1) assurances of employment to employees of such transportation systems to the fullest extent possible consistent with sound management, and priority of employment, or, if terminated or laid off reemployment; (2) preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (3) continuation of collective bargaining rights; (4) protection of individual employees against a worsening of their positions with respect to their employment, to the extent provided by §13(c) of the Urban Mass Transportation Act, as amended, 49 U.S.C. 1609(c); and (5) paid training and retraining programs. Such protections shall be specified by the commission in any contract or lease for the acquisition of operation of any such transit facilities

or services. The employees of any transit facility operated by the commission shall have the right, in the case of any labor dispute relating to the terms and conditions of their employment for the purpose of resolving such dispute, to submit the dispute to final and binding arbitration by an impartial umpire or board of arbitration acceptable to the parties. (1974, c.53).

The issues presented in this case concern the interpretation and enforcement of a collective bargaining agreement and a 13(c) agreement similar to those to which TTDC is a party. Moreover, the Sixth Circuit has recognized the existence of federal transit labor law that threatens to transcend and preempt state public employee law.

These same issues have confronted TTDC in prior litigation,[3] and at the present time there is currently pending in the United States District Court for the Eastern District of Virginia a case in which TTDC is again faced with these identical

[3]Division 1177, Amalgamated Transit Union v. Tidewater Transportation District Commission, No. 79-968-N (E.D. VA. Nov. 8, 1979). This case involved the duty of TTDC to proceed to interest arbitration. The parties ultimately settled their differences and the case was dismissed for mootness.

questions.[4] Accordingly, this Court's disposition of this matter will have a direct and substantial impact on TTDC.

TTDC submits that the Sixth Circuit's decision, if left undisturbed, would seriously jeopardize the ability of local transit authorities to manage and direct their work forces in a manner best suited to meet the needs of their constituent communities. Beset with soaring financial costs, and the prospect of termination of federal operating subsidies,[5] it is essential that local agencies retain the flexibility needed to develop solutions for their individual transit ills. Congress

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[4] Division 1177, Amalgamated Transit Union v. Tidewater Transportation District Commission, No. 81-1112-N (E.D. VA. Nov. 23, 1981).

[5] U. S. News and World Report, August 31, 1981, at 21.

never intended that federal courts would thwart this flexibility by asserting jurisdiction over matters of a purely local nature. Nor did Congress intend to create a federal transit labor law that would supersede state and local public employee law, forcing Norfolk, Virginia and Jackson, Tennessee to adhere to the same labor policies as New York and Los Angeles.

To protect local control of mass transit services TTDC, by and through its authorized law officer, files this Brief as Amicus Curiae in support of the position taken by the Jackson Transit Authority and the City of Jackson, Tennessee.

SUMMARY OF ARGUMENT

This case presents questions which go to the very heart of the

federal judiciary's role in labor policy administered and formulated by public transit authorities throughout the United States. The Sixth Circuit's ruling that §13(c) reflects a national transit labor policy is in direct conflict with the expressed intent of Congress that transit labor problems be adjudicated pursuant to state substantive law. By attempting to create a federal common law governing public transit workers, the court below has embroiled the federal system in matters that have been traditionally the province of state courts. In sum, it is TTDC's position that the Sixth Circuit erroneously interpreted the legislative history of §13(c) and should be reversed.

ARGUMENT

I. THE URBAN MASS TRANSPORTATION ACT DOES NOT CREATE, AND CONGRESS DID NOT INTEND TO CREATE, ANY BODY OF FEDERAL TRANSIT LABOR LAW THAT WOULD SUPERSEDE LOCAL PUBLIC EMPLOYEE LAW.

The Sixth Circuit's holding that §13(c) of UMTA reflects a paramount national labor policy is neither supported by the express purpose of UMTA nor the expressed intent of Congress. Nowhere in the Act or its legislative history is there an indication that the Act, and in particular, §13(c), created new substantive rights for employees to be administered according to federal law. On the contrary, the legislative history and language of UMTA clearly show that state and local law control the relationship between a public transit authority and its employees.

Citing the financial plight of mass transportation services in our nation's urban areas, Congress recognized the unique problems faced by the various localities and provided that each local authority was to be operated "as determined by local needs." 49 U.S.C. §1601(b)(3). Interference in the "mode of operation of any mass transportation system" is expressly forbidden. 49 U.S.C. §1608(d).

The legislative history of UMTA contains countless references to the fact that the protections outlined in §13(c) are secondary to the purpose of the entire legislation and were not meant to supersede state law. As Senator Williams, a strong supporter of §13(c), observed:

> This provision is truly ancillary to the thrust of the transportation program. It is only included in the interest of fairness and equity. . . .
>
> . . .
>
> The legislative history has to be corrected, however, because if the bill shall be enacted, we must have a record that will show that the bill does not preempt State law; it does not control or dominate with irrevocable authority local situations. The bill provides for the encouragement of collective bargaining. That does not put the force of a mandate on a community. . . I do not believe we can pass a law which would change State law; and we do not attempt to do so. . . 109 Cong. Rec. 5417 (1963).

The First Circuit recently analyzed the legislative history of §13(c) in Local Division 589, etc. v. Massachusetts, ____ F.2d ____ (1st Cir. 1981) (Supplemental Pet. Apx. at 1a-55a). In that case, the union contended that §13(c) assurances override state law. Noting that upholding the

Union's position would result in the transfer of local transit labor relations from state to federal government, the court rejected this proposition and held:

> To the contrary, the legislative history suggests that Congress was sensitive to the local nature of local transit; it 'expected that specific conditions [in §13(c) assurances] normally will be the product of local bargaining and negoitations;' (citations omitted) and its members made the many statements previously discussed suggesting the legal supremacy of State law. Id. at 32a.

The First Circuit also noted the Sixth Circuit's holding that §13(c) reflects a national labor policy that preempts state law. The First Circuit, however, disapproved of this reasoning and stated that the court below did not analyze the legislative history "in depth." Id. at 37a.

The practical effect of the Sixth Circuit's decision is to involve federal courts in myriad disputes involving interpretation and application of §13(c) agreements and collective bargaining contracts. As shown by UMTA's legislative history, Congress surely did not intend to burden the federal judiciary in this manner; nor did Congress intend to circumvent the state judicial system.

Several states, including Virginia, have enacted statutes specifically covering transit employees.[6] The Virginia statute, for example, is

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[6] See e.g., LA. REV. STAT. ANN. §23:890 (West Cum. Supp. 1981); N.J. STAT. ANN. §40:37 A-96 (West Cum. Supp. 1981-1982); N.M. STAT. ANN. §3-52 (1978); OHIO REV. CODE ANN. §306.12 (1979); R.I. GEN. LAWS §39-18-17 (1977); PA. STAT. ANN. tit. 53 §39951 (Purdon Cum. Supp. 1981-1982); W.VA. CODE §8-27-21 (1976).

modeled on 49 U.S.C. §1609(c) and provides employees with statutory authority to arbitrate their differences.[7] Accordingly, as Judge Merritt stated in his dissent below, there is absolutely no reason to think that the Virginia courts or other state courts "cannot decide these private breach of contract cases just as fairly and just as efficiently as federal courts." Local Division 1285 v. Jackson Transit Auth., 650 F.2d 1379, 1389 (1981).

Clearly, then, Congress did not intend to foster any "national labor policy" or create federal transit law by enacting §13(c). Rather, Congress recognized that each transit authority is unique in its history of development and manner of operation. TTDC operates

[7] See n. 2

in a legal, social, and economic environment different from other transit authorities.

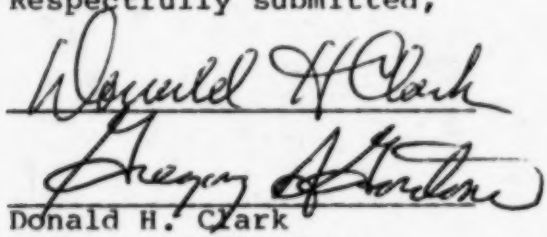
The Sixth Circuit's decision to apply a uniform transit labor law will hinder TTDC and other transit agencies in their attempts to structure employee relations according to their individual needs. Moreover, this ruling contravenes a clear congressional intent to allow local transit authorities to resolve their contractual disputes and labor problems under state law.

CONCLUSION

For the foregoing reasons, and for those reasons expressed by Petitioner, Amicus Curiae Tidewater Transportation District Commission respectively requests this Court to reverse the decision of the Sixth Circuit and order that the case be remanded to the Circuit

Court with instructions that the District Court's judgment be affirmed.

Respectfully submitted,



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